Supreme Court, U.S.
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**IN THE SUPREME COURT OF THE UNITED STATES**

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**ARTICHOKE JOE'S, CALIFORNIA GRAND CASINO; FAIRFIELD YOUTH FOUNDATION; LUCKY CHANCES, INC.; OAKS CLUB ROOM; SACRAMENTO CONSOLIDATED CHARITIES,**

*Petitioners,*

v.

**GALE A. NORTON, Secretary of Interior; JAMES McDIVITT, Acting Assistant Secretary of Interior; ARNOLD SCHWARZENEGGER, Governor of California; BILL LOCKYER, Attorney General of California; HARLAN W. GOODSON, Director of California Division of Gambling Control; JOHN E. HENSLEY, Chair, California Gambling Control Commission; MICHAEL C. PALMER, Member, California Gambling Control Commission; J.K. SASAKI, Member, California Gambling Control Commission; ARLO SMITH, Member, California Gambling Control Commission,**

*Respondents.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Proposition 1A, an amendment to the California Constitution, gives Indian tribes the exclusive right to operate Class III gaming (casino gaming, including slot machines) in California. Such gaming by others is a crime. The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, provides that Class III gaming shall be lawful on Indian lands only if conducted under a Tribal-State compact in a state that "permits" such gaming by any person, organization, or entity and where slot machines are "legal." 25 U.S.C. § 2710(d)(1), (d)(6). Pursuant to Proposition 1A and IGRA, the Governor of California signed, and the Secretary of Interior approved, compacts with 62 Indian tribes giving them monopoly rights to conduct Class III gaming in California -- a $5-6 billion-a-year business.

The questions presented are:

1. Does IGRA allow a state to permit *only tribes* to engage in Class III gaming?

2. If IGRA allows such a monopoly, does that statute, as well as Proposition 1A and the 62 compacts, violate equal protection principles?

3. More generally, can Congress, consistent with equal protection principles, authorize a state to award a major segment of its economy solely to Indian tribes, while excluding others from participating in that economic arena, even on non-Indian lands?

## RULE 29.6 STATEMENT

Petitioner Artichoke Joe's is a California corporation. It has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner Lucky Chances, Inc. is a California corporation. It has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner California Grand Casino is a sole proprietorship.

Petitioner Oaks Club Room is a partnership.

Petitioners Fairfield Youth Foundation and Sacramento Consolidated Charities are California non-profit corporations.

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## PETITION FOR A WRIT OF CERTIORARI

Artichoke Joe's, California Grand Casino, Fairfield Youth Foundation, Lucky Chances, Inc., Oaks Club Room, and Sacramento Consolidated Charities respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (Petitioner's Appendix ("Pet. App.") 1a-57a) is reported at 353 F.3d 712. The order of that court denying rehearing (Pet. App. 143a-144a) is unreported. Judge Rhoades, who originally joined the court's decision, dissented from the order denying rehearing. The opinion of the district court (Pet. App. 58a-142a) is reported at 216 F. Supp. 2d 1084.

## JURISDICTION

The court of appeals entered judgment on December 22, 2003. A timely petition for rehearing was denied on March 1, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d), provides in pertinent part:

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are --

* * * * *

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

* * * * *

(6) The provisions of section 1175 of title 15 [which generally prohibit gambling devices on Indian land] shall not apply to any gaming conducted under a Tribal-State compact that --

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

A copy of California Proposition 1A, which amended the California Constitution Art. 4 Sec. 19 by adding Section 19(f), is set forth at Pet. App. 145a-146a.

## STATEMENT

1. In March, 2000, California voters approved Proposition 1A, which amended the California Constitution to authorize the Governor to sign compacts allowing Indian tribes to conduct certain forms of casino-style gaming, including slot machines (Class III gaming), while maintaining a prohibition against others doing so.[1] Anticipating Proposition 1A, the Governor had signed 57 compacts. These compacts stated their intent to "create a unique opportunity for [each] Tribe to operate its Gaming Facility in an economic environment free of competition from the Class III gaming ... on non-Indian lands in California." Pet. App. 11a.

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[1] Class III gaming by others is a crime. Cal. Penal Code, §§ 330, *et seq*. The relevant sections of the California Penal Code are set forth at Pet. App. 147a-148a.

These compacts, plus five more subsequently signed, were approved by the Assistant Secretary of Interior for Indian Affairs acting for the Secretary, as required by IGRA. 25 U.S.C. § 2710(d)(8). The Assistant Secretary concluded that "[t]he compact provision, which gives the Tribe, along with other tribes in the State, the exclusive right to conduct limited forms of Class III gaming on Indians lands, is consistent with IGRA ... and does not violate the United States Constitution." ER 37. In California, tribal gaming is now a $5-6 billion-a-year business. *See* p. 10 n.5 *infra*.

Plaintiffs are California card clubs and charities that have lost customers because they are forbidden from offering types of gaming that tribal casinos operate and that many of plaintiffs' customers prefer. Plaintiffs sued the Secretary of Interior under the Administrative Procedure Act, and the Governor and various state officials under 42 U.S.C. § 1983, alleging that California's creation of a tribal casino monopoly violates IGRA, and that, if IGRA is construed to authorize such a monopoly, it violates equal protection principles, as do Proposition 1A and the compacts.

IGRA provides that Class III gaming "shall be lawful on Indian lands only" if it is "located in a State that permits such gaming for any purpose by any person, organization, or entity . . . ." 25 U.S.C. § 2710(d)(1). It also provides that the general prohibition of slot machines on Indian land is inapplicable if they are operated, pursuant to a compact, in a state where slot machines are "legal." 25 U.S.C. § 2710(d)(6). Plaintiffs contended that this language means that the state must "permit[] such gaming," and make slot machines "legal" *on non-Indian land*, because a state has no authority to permit gaming or legalize slot machines only on Indian land. The district court dismissed the complaint, holding that IGRA authorizes a statewide tribal Class III

monopoly and that this monopoly satisfies equal protection. Pet. App. 58a-142a.

2. The court of appeals affirmed. Pet. App. 57a. The court conceded that plaintiffs have a "plausible" argument that, to satisfy the statute, a state must "permit[]" Class III gaming on non-Indian land. Pet. App. 17a. However, the court concluded, the statute "is susceptible to more than one interpretation." Pet. App 20a.

The court determined that it could not resolve the statutory ambiguity by examining past judicial construction or the statute as a whole. Pet. App. 21a-25a. As to legislative history, the court acknowledged that "[p]laintiffs reasonably interpret IGRA as ... intended to maintain a competitive balance between Indian and non-Indian gaming interests ...." Pet. App. 21a. Nevertheless, the court concluded that "[a]s is true of the operative text, Congress' statements of intent in enacting IGRA, and IGRA's legislative history, leave us in equipoise between the parties' competing interpretations of the statute." Pet. App. 25a. Indeed, the court could not find any clear indication "that Congress even considered the question before us." Pet. App. 26a.

In these unique circumstances, the court decided the statutory interpretation issue by relying *solely* on the canon that ambiguous statutes intended to benefit tribes should be construed in their favor: "We adopt Defendants' construction, not because it is necessarily the better reading, but because it favors Indian tribes and the statute at issue is both ambiguous and intended to benefit those tribes." Pet. App. 34a.

3. The court recognized that, where the doctrine that an ambiguous statute must be construed to avoid

constitutional doubts is applicable, it "trumps statutory constructions favoring Indians." Pet. App. 35a. However, this doctrine, the court said, applies only where needed to "avoid *serious* constitutional doubts." *Id.*, (quoting *Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993)) (emphasis in original). The court applied the Indian canon because it believed the constitutional issues raised by the authorization of a tribal monopoly are not "serious." Pet. App. 35a-36a.

In examining the constitutional issue, the court recognized that the proper test under *Morton v. Mancari*, 417 U.S. 535, 555 (1974) is whether "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians ...." Pet. App. 38a. The court, however, did not directly address the central constitutional issue presented by this case -- whether Congress may authorize a state to carve out a $5-6 billion-a-year segment of its economy solely for the benefit of tribes. Indeed, the court ducked this issue, concluding that "IGRA does not ..., itself, create[] a monopoly." Pet. App. 43a.

Rather, the court analyzed IGRA and Proposition 1A separately. It held that IGRA (and the compacts) met the unique obligation standard because IGRA generates revenue for Indian tribes and because it "regulates activities only on Indian lands" -- a limitation the court deemed "critical given the well-established connection between tribal lands and tribal sovereignty." Pet. App. 43a.

The court found Proposition 1A "a more difficult question because it establishes the monopoly of which Plaintiffs principally complain." Pet. App. 46a. Nevertheless, despite the fact that Proposition 1A applies throughout the State and thus does not meet the "critical" limitation of regulating activities only on tribal land, the court concluded that Proposition 1A also passes the *Mancari*

test. This is so, the court said, because Proposition 1A regulates a "vice activity" and because it "promote[s] cooperative relationships between the tribes and the State by fostering tribal sovereignty and self-sufficiency." Pet. App. 47a-57a.

The court's decision thus allows California tribes to exercise monopoly rights over a major segment of the state's economy. All others who engage in Class III gaming face criminal sanctions.

## REASONS FOR GRANTING THE WRIT

1. This case presents questions of national legal and societal importance. The core issues, not previously directly addressed by this Court, are (1) whether IGRA allows a state to award a *statewide* Class III gaming monopoly to tribes and (2), if it does, whether equal protection principles permit such exclusivity regarding a major segment of a state's economy.

For the first time, a federal court of appeals has allowed a state to carve out a $5-6 billion-a-year segment of its economy and award it to Indian tribes, while excluding all others from this business not only on Indian land, but statewide. The case has national significance because presently there are tribal casinos in 30 states, only seven of which also allow non-Indian casinos. Moreover, the defective logic of the court's constitutional ruling would allow tribal monopolies not only for casinos but also for any lucrative economic activity.

The case is particularly significant because the Ninth Circuit -- if its misguided use of the Indian canon is rejected, as it should be -- has left the interpretation of a major statute, IGRA, hopelessly muddled. The Court should take this case

to decide whether IGRA's language itself allows a state to grant tribes a Class III gaming monopoly, while preventing such gaming by others on non-Indian land.

2. Both a commonsense reading of IGRA and its legislative history demonstrate that, contrary to the Ninth Circuit's conclusion, the statute allows tribes to operate only those Class III games that others in a state may operate on non-Indian land.[2] Moreover, in an important respect, the Ninth Circuit's interpretation conflicts with the Tenth Circuit's decision in *Citizen Band Potawatomi Indian Tribe v. Green*, 995 F.2d 179 (10th Cir. 1993). That case concerned the IGRA provision stating that a tribe cannot operate slot machines unless they are "legal" in the state and conducted pursuant to a Tribal-State compact, which must be "in effect." 25 U.S.C. § 2710(d)(6). *Potawatomi* held that IGRA requires that slot machines "be legal absent the Tribal-State compact: otherwise it would not have been necessary to require both that gambling devices be legal ... and that the compact be 'in effect.'" 995 F.2d at 181. The Ninth Circuit's decision conflicts with *Potawatomi*, because in California slot machines are *not* "legal absent the Tribal-State compact." Proposition 1A expressly makes tribal slot machines legal only if they are "subject to ... the Tribal-State compact." The Court should resolve this intercircuit conflict.

3. The court of appeals' decision, which resolved the statutory interpretation issue *solely* on the basis of the Indian canon, conflicts with decisions of this Court, giving the

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[2] Both Sixth Circuit dictum and an earlier Ninth Circuit decision take this position. *See Keweenaw Bay Indian Cmty. v. United States*, 136 F.3d 469, 473 (6th Cir. 1998); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994), *amended*, 99 F.3d 321 (9th Cir. 1996), *cert. denied*, 521 U.S. 1118 (1997).

canon far more weight than it can bear. That canon is trumped by the canon providing that statutes should be interpreted to avoid serious constitutional issues. The court of appeals' interpretation at the least raises a serious constitutional issue. Indeed, how can anyone reasonably conclude that giving tribes a $5-6 billion-a-year monopoly slice of a state's economy does not?[3]

As the Court has stated, the purpose of the canon is to protect a weak and defenseless people who are wards of the nation. *McLanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973) (*quoting Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)). But this rationale has no application here where politically sophisticated tribes were able to shape IGRA's scope. Moreover, the Court has said that the Indian canon is no more than a rule used to decipher Congressional intent. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). It should not be used to reach a result -- tribal monopoly -- that, the court of appeals concluded, Congress did not "even consider," and thus did not specifically intend.

4. Not only does the court of appeals' interpretation raise a serious constitutional issue, it conflicts with decisions of this Court as to the scope of preferences that may be afforded tribes.[4] Tribal preferences are permissible only if reasonably tied to "Congress' unique obligation toward the

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[3] If, as the court suggested, Congress has virtually unlimited power to authorize a tribal monopoly, then, under this Court's precedents, IGRA must contain a "clear statement" allowing such a monopoly before it will be interpreted to do so. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001). But, as the lower court found, IGRA does not. Pet. App. 16a-25a.

[4] Indeed, an earlier Ninth Circuit decision stated that an Indian casino monopoly would be unconstitutional. *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997).

Indians." *Morton v. Mancari*, 417 U.S. at 555. That rule is a "limited exception" to the general prohibition against racial preferences. *Rice v. Cayetano*, 528 U.S. 495, 520 (2000). "Congress' unique obligation toward the Indians" does not allow it to permit a state to give tribes exclusive access to a $5-6 billion-a-year business.

Casino gaming has no unique relationship to Indian history or culture. A tribal gaming monopoly cannot be justified on the ground that it betters the economic fortunes of tribes and thus promotes tribal self-sufficiency and sovereignty, because that rationale establishes no limits to the tribal preferences that Congress might allow. Moreover, promotion of tribal sovereignty over Indian land does not justify a state law that allows gaming on Indian land *and prohibits it everywhere else*. And no principled rationale supports the bizarre notion that monopolies for "vice activities" rationally relate to "Congress' unique obligation toward the Indians," and thus are constitutionally allowable, but other monopolies are not.

## I. The Issues Presented By This Case Are Of Great National Importance.

The core issues here are whether IGRA allows a state to grant a *statewide* casino monopoly to tribes and, if so, do equal protection principles allow such exclusivity regarding a major segment of a state's economy. These are issues of national legal and economic importance, which this Court previously has not directly addressed.

Casino gambling is "one of the nation's fastest growing industries and most popular leisure activities." Nicholas S. Goldin, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gambling*, 84 Cornell L. Rev. 798, 800 (1999).

"[H]igh-stakes casinos boast more visitors than the aggregate attendance of all professional and college football games, arena and symphony concerts, and theatrical events combined." *Id.* In California alone, tribal gaming generated $3.4 billion a year in 2002, up 17% from the previous year.[5] More recent estimates place California annual tribal gaming revenues at $5-6 billion.[6] Nationwide in 2002, there were 221 tribes operating 348 casinos in 30 states with total revenues over $14 billion; only seven of these states allow competition from non-Indian commercial casinos.[7] There are now 291 groups seeking federal recognition as tribes, nearly all of them receiving significant financial backing from non-Indian investors hoping to reap substantial profits from casino management contracts.[8]

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5 Alan Meister, Ph.D., *The Economic Impact of Indian Gaming 2d Annual Report* 8 Table 3a (Analysis Group, Inc. May 2003).

6 Glenn F. Bunting, *Ex-Actor, Chumash Plan Community*, L.A. Times, Mar. 16, 2004, at B1 ($5 billion), David M. Drucker, *Tribes, Governor Move Ahead on Casino Deal*, Oakland Tribune, Feb. 4, 2004 ($6 billion); Alan Murray, *Political Capital: Tap Casino Money*, Wall Street Journal, Oct. 14, 2003 ($5 billion).

7 Alan Meister, Ph.D., *The Economic Impact of Indian Gaming 2d Annual Report* 6 Tables 1, 2a, 2b (Analysis Group, Inc. May 2003). The tribal casino states are: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Washington, Wisconsin, and Wyoming. Of these states, only 7 also allow non-Indian commercial casinos: Colorado, Iowa, Louisiana, Michigan, Mississippi, Nevada, and South Dakota. *Id.* at 8 Table 4.

8 Iver Peterson, *Would-Be Tribes Entice Investors*, N.Y. Times, Mar. 29, 2004, at A1. *See also* Donald L. Bartlett, *et al.*, *Playing the Political Slots: Part Two: How Indian Casino Interests Have Learned the Art of Buying Influence in Washington*, Time Magazine, Dec. 23, 2002, at 52;

As observed, the court of appeals left considerable doubt about the meaning of a significant federal statute. Moreover, the court's constitutional reasoning would allow a tribal monopoly as to any lucrative economic activity. And under the court's reasoning, possible monopolies could extend well beyond reservation boundaries.

Given the political influence tribes have wielded by generous use of gambling revenues, they likely will seek to exploit the Ninth Circuit's ruling in other areas of economic activity.[9] Indeed, there is already an Indian preference for certain federal defense contracts that will not be performed on reservations.[10] The time is ripe for this Court to consider whether Congress in IGRA in fact authorized casino tribal monopolies and, if so, whether equal protection principles prevent such exclusivity.

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Donald L. Bartlett & James B. Steele, *Wheel of Misfortune*, Time Magazine, Dec. 16, 2002, at 44.

[9] Indian casinos in California gave $7.3 million to California candidates in 1998; the next largest contributor group gave $1.9 million. ER 62. In the recent California recall campaign, Indian tribes reportedly gave more than $11 million of the $88 million contributed. Dan Morain, *Recall Campaigners Spend $88 Million, Despite Limits*, L.A. Times, Feb. 4, 2004, at B6. Between 1998 and 2001, California tribes spent $114 million in political campaigns. (ER 062.)

[10] *American Fed'n of Gov't Employees v. United States*, 330 F.3d 513 (D.C. Cir.), *cert. denied*, 124 S. Ct. 957 (2003) (sustaining preference for Alaskan tribal corporation for contract to perform maintenance on Air Force base in New Mexico).

## II. The Court Of Appeals' Interpretation Of IGRA Is Erroneous, Ignores The Legislative History, Conflicts With A Tenth Circuit Decision, And Is Not Justified By The Indian Canon.

### A. The court of appeals' interpretation violates the plain meaning of the statute.

At issue is whether a state provision that permits *only* tribes to conduct Class III gaming and operate slot machines fulfills IGRA's provisions requiring the state to "permit" such gaming and to make slot machines "legal" as a precondition to Indian gaming. 25 U.S.C. § 2710(d)(1), (d)(6). Plaintiff's commonsense position is that the IGRA sections are purely "location" provisions -- that tribes may do what others may do in the state where the tribes are located.[11] Plaintiffs assert that these requirements must refer to gaming and slot machines on non-Indian land, because the state has no legal authority to "permit" gaming or make slot machines "legal" only on Indian land.[12] The court of appeals conceded that plaintiffs' position is "plausible." Pet. App. 17a. However, it concluded that "an alternative understanding of the verb 'permit'" is also plausible, for three reasons.

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[11] Sixth Circuit dictum and an earlier Ninth Circuit opinion adopted this interpretation. "IGRA provides that tribes are entitled to engage in all forms of Class III gaming that a state permits *for other citizens*." *Keweenaw Bay Indian Community v. United States*, 136 F.3d 469, 473 (6th Cir. 1998) (emphasis added). "[A] state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have." *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994).

[12] Plaintiffs also contended that defendants position is glaringly circular, in effect asserting, *e.g.*, that tribes may operate slot machines if they are legal and that they are legal because tribes may operate them.

First, the court argued that, pre-IGRA, "California still had *some* jurisdiction over Indian lands pertaining to gaming," because this Court held that under Public Law 280 a total, criminal prohibition of gaming in California would have been enforceable on Indian land. Pet. App. 18a (emphasis in original) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)). But the state's authority, under the statute applicable pre-IGRA, to adopt a statewide gaming *prohibition* that applied on Indian land is irrelevant to the issue whether a state under IGRA may "permit" class gaming on Indian land, while denying it elsewhere. It cannot.

Second, the court argued that IGRA gave California regulatory authority over gaming on Indian land. Pet. App. 18a-19a. But the provision of IGRA relied on by the court, *does not apply to compact gaming*. 18 U.S.C. § 1166(c)(2). Moreover, where it is apposite, § 1166 provides that state gaming laws apply in Indian land "in the same manner and to the same extent as such laws apply elsewhere in the State." That language plainly does not authorize a state to permit casino gaming only on Indian land, while making it a crime everywhere else.

Third, the court of appeals construed the verb "permit" as going beyond a "legally binding affirmative act." Pet. App. 19a. That construction is untenable given IGRA's parallel provision for slot machines, which allows them on Indian lands only if they are "legal" in the state. 25 U.S.C. § 2710(d)(6). A "legally binding affirmative act" by a state clearly is required to make slot machines "legal." Similarly, a legally binding affirmative act is necessary to fulfill the requirement that a state "permit" Class III gaming.[13]

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[13] The court of appeals conceded that the interpretation of § 2710(d)(6)'s requirement that slot machines be "legal" in the state must

Because California had no jurisdiction to "permit" casino gaming or make slot machines "legal" only on Indian land, it could not fulfill IGRA's state "permission" and "legality" requirements by any measure attempting to do so. IGRA must be interpreted to mean that tribes may conduct only those games allowed others on non-Indian land.[14]

### B. The legislative history confirms that Congress did not intend to authorize tribal casino monopolies.

The court of appeals concluded that the legislative history was in "equipoise" (Pet. App. 25a-6a), but it reached this conclusion on the basis of a highly distorted reading of that history. In fact, the legislative history strongly supports the view that Congress did not intend to authorize tribal gambling monopolies.

The court acknowledged that "the notion of free market competition does appear in the legislative history." Pet. App. 27a. Indeed it does. The Senate Report explicitly states that Congress expected "a fair balancing of competitive economic interests," "consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied," and "free market

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be the same as the interpretation of § 2710(d)(1)'s requirement that the state "permit" Class III gaming. Pet. App. 15a n.11.

[14] Even if the court were right in concluding that California had independent authority under IGRA to "permit" Indian gaming apart from the compacts, Proposition 1A does not purport to do that. All Proposition 1A does is to "permit" gaming on Indian land "*subject to those compacts*." Pet. App. 146a. Thus the state's alleged authority to grant "permission" and "legality" independent of the compacts is irrelevant.

competition" between tribes and "other State-licensed gaming enterprises." S. Rep. 100-446, at 1-2, 6, 13, *reprinted in* 1988 U.S.C.C.A.N. 3083. The court discounted these passages, noting that they occurred "most prominently in the context of warning states not to abuse the compacting process to protect non-Indian gaming interests." Pet. App. 27a. But, while Congress' primary intent may have been to protect tribes, it did so by guaranteeing "consistency and uniformity" and "free market competition" -- not by authorizing Indian monopolies.[15]

The court of appeals also found support for its interpretation because the final language of the "state permission" requirement was broader than the corresponding provision of the original bill, which would have allowed gaming "that is otherwise legal within the State." Pet. App. 29a (quoting Senate Bill 555, 100th Cong. (1987)) But the court of appeals fails to mention that the bill from which the state "permission" language was taken *also* made it plain that a state had no jurisdiction over Indian land and thus could "permit" gaming only on non-Indian land. Under that bill, the tribe -- not the state -- had jurisdiction over Class III gaming on Indian land. S. 1303, 100th Cong. § 10(b) (1987). There was no provision for State-Tribal compacts, and thus no way for a state to "permit" gaming on Indian land.

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[15] The court also ignored the statements of several prominent Senators and Congressmen during the Congressional debates forcefully establishing that Congress did not intend a tribal monopoly. Senator McCain said IGRA addressed the need for a "level playing field" permitting tribes "to install gaming operations that are the same as the States in which they reside." 134 Cong. Rec. 24027 (Sept. 15, 1988). Senator Domenici and Representatives Udall and Bilbray made similar statements. 134 Cong. Rec. 24023, 25381, 25376 (Sept. 15 and 26, 1988).

The final legislation adopted the compact requirement, under which tribes and a state could agree to share jurisdiction. But, as the court acknowledged, the compact requirement was adopted *not* as a way of expanding the state "permission" requirement, but rather "to resolve the most contentiously debated issue in the legislation: which authority -- Tribal, State, or Federal -- would regulate class III gaming." Pet. App. 26a.[16]

In fact, *both* S. 555 and S. 1303 -- the predecessor bills -- would have confined state "permission" to games allowed by the state on non-Indian lands over which the state has jurisdiction. The compact requirement plainly was not introduced to expand the category of permissible Class III gaming beyond that permitted on non-Indian land.[17]

The court also correctly recognized that Congress "enacted IGRA with the assumption that States would use laws and regulatory systems that police *extant* class III gaming operations to regulate similar operations on tribal lands," and thus shield tribal gaming from organized crime. Pet. App. 28a (emphasis in original).[18] *See also* 25 U.S.C. § 2702. While the court of appeals observed that a Congressional assumption may not be a requirement (Pet. App. 28a), here the Congressional assumption of an existing state Class III regulatory system gives meaning to the basic statutory requirement that tribal Class III gaming be "located

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[16] The court concluded that Congress did not "even consider" tribal monopolies, and thus cannot legitimately claim that Congress changed the statutory language to allow them. Pet. App. 26a.

[17] The legislative history of IGRA is described in detail in Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 Creighton L. Rev. 387, 395-412 (1993).

[18] *See*, in the same vein, Pet. App. 29a.

in a State that permits such gaming." 25 U.S.C. § 2710(d)(4).

In sum, the legislative history shows that Congress did not intend to create tribal monopolies. Had it intended such a radical result, the statutory language would have been explicit, the legislative history far different.

### C. In an important respect, the court's interpretation conflicts with a Tenth Circuit decision.

As noted, IGRA provides that Class III gaming shall be lawful on Indian lands only if, *inter alia*, it is (i) located in a state that "permits such gaming for any purpose by any person, organization or entity," and (ii) conducted in conformance with a State-Tribal compact. 25 U.S.C. § 2710(d)(1). IGRA also provides that the Johnson Act prohibition against slot machines on Indian land shall not apply to any gaming conducted under a "Tribal-State compact that -- (A) is entered into ... by a State in which gambling devices are legal, and (B) is in effect." 25 U.S.C. § 2710(d)(6). Because slot machines are a form of Class III gaming, these two provisions must be construed in similar fashion, as the court of appeals recognized. Pet. App. 15a n.11.

The Tenth Circuit's decision in *Citizen Band Potawatomi Indian Tribe v. Green*, 995 F.2d 179 (10th Cir. 1993), is directly contrary to the Ninth Circuit's ruling as to the Johnson Act issue. In that case, Oklahoma had entered into a compact with a tribe authorizing it to operate slot machines. The court of appeals held that slot machines were prohibited by Oklahoma law. The court "reject[ed] as patent bootstrapping" the Tribe's argument that "the Compact itself legalizes [slot machines] for purposes of

[§ 2710(d)(6)]," *Id.* at 181. The court reasoned that "Congress must have meant that gambling devices be legal absent the Tribal-State compact; otherwise it would not have been necessary to require both that gambling devices be legal ... and that the compact be 'in effect.'" *Id.*

The same analysis applies to § 2710(d)(1). Congress must have meant that the state permit Class III gaming absent the Tribal-State compact; otherwise it would not have been necessary to require both that the state permit Class III gaming and that it be conducted under a Tribal-State compact.

The Ninth Circuit attempted to distinguish *Potawatomi* on the ground that Oklahoma lacked a provision like Proposition 1A. Pet. App. 16a-17a. However, unless there is some state law authorizing it, a compact is a nullity and IGRA's compact requirement is not met.[19] To avoid "patent bootstrapping," something more than a state law authorizing a compact is needed to fulfill the state permission requirement. A provision authorizing the Governor to sign compacts does not suffice, because any valid compact requires such a provision.

The court of appeals reasoned that "Proposition 1A does more than authorize the Governor to enter into Tribal-State compacts." Pet. App. 17a. "It explicitly states that 'slot machines, lottery games and banking and percentage card games *are hereby permitted* to be conducted and operated on tribal lands' subject to the regulations embodied in the Tribal-State compact." *Id.* (quoting Proposition 1A) (emphasis added by court). But the Proposition 1A language

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[19] "[A] compact entered into by someone without authority to bind the state is void." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1554 (10th Cir. 1997).

relied on by the court "permits" tribal Class III gaming only *"subject to [the] compacts."* Pet. App. 146a. Because the court of appeals, as a functional matter, did not require that slot machines "be legal absent the Tribal-State compact," its holding is in direct conflict with the Tenth Circuit decision in *Potawatomi*.

### D. The court's use of the Indian canon conflicts with decisions of this Court.

Finding the statute ambiguous and the legislative history in "equipoise," the court chose an interpretation favoring the tribes *solely* on the basis of the canon that statutes intended to benefit tribes are to be construed liberally in their favor. Pet App. 32a-34a. But that holding takes the Indian canon far beyond this Court's previous decisions. As this Court explained in *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001), (which the court of appeals failed to cite), the canons "are not mandatory rules." They are only "guides" to "help judges determine the Legislature's intent as embodied in particular statutory language." *Id.* In this case, however, the court used the Indian canon as more than a "guide." Here the canon has been made to bear the entire weight of the decision. That is particularly inappropriate because Congress did not "even consider" tribal monopolies (Pet. App. 25a-26a) and perforce did not specifically intend to ordain them.[20]

The Indian canon, first developed as to treaties, is intended to protect "weak and defenseless people who are wards of the nation." *McLanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973) (*quoting Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)). But IGRA's legislative history shows that

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[20] "[O]ther circumstances evidencing Congressional intent can overcome [the canon's] force." *Chickasaw*, 534 U.S. at 94.

politically sophisticated, financially powerful tribes forcefully advocated their interests and helped shape the eventual legislation. Pet. App. 26a (compact provision was a compromise between states and tribes).[21] To apply the canon blindly here to protect a "weak and defenseless people" would ignore reality. Moreover, this Court previously has used the canon principally to prevent intrusions on tribal sovereignty.[22] Never has it applied the canon totally to exclude non-Indians from a major segment of a state's economy, a result going far beyond the canon's purposes.

As discussed below, allowing balkanization of California's economy also raises serious constitutional issues. This Court repeatedly has said that statutes must be interpreted to avoid such constitutional concerns. *I.N.S. v. St. Cyr*, 533, U.S. 289, 299-300 (2001). And, as the court of appeals recognized, this canon, where apposite, "trumps" the Indian canon, rendering it inapplicable. Pet. App. 35a. For this reason also, the court of appeals was wrong in making the Indian canon the sole basis of its decision.

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[21] Also, some tribes took the position that tribes should be only allowed gaming others can have. *Gaming Activities on Indian Reservations and Lands: Hearing before the United States Senate Select Committee on Indian Affairs on S. 555 and S. 1303*, 100th Cong. 231 ("Hearings"), "[t]he legislation should clearly provide for and authorize Indian gaming in any state within which similar activity is permitted by non-Indians under state law" (All Indian Pueblo Council). *See also* Hearings at 421-22, indicating that the Fort Mojave Indian Tribe of Arizona, California and Nevada supported the provision of S. 555 that "authorizes Class III gaming in states where such gaming is legal."

[22] *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-45 (1980) (statute construed to preserve "traditional notions of sovereignty and tribal independence"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71-2 (1978) (statute construed to avoid "additional intrusion on tribal sovereignty").

To conclude that the constitutional issue is not serious, the Court would have to determine that Congress' power to give tribes monopoly rights is virtually unlimited. But if that is so, the Court's opinions require a "clear statement" in IGRA that Congress was ordaining monopoly rights before the statute will be interpreted to allow them. "The Court ... has tended to create the strongest clear statement rules to confine Congress' power in areas in which Congress has the constitutional authority to do virtually anything." *I.N.S. v. St. Cyr*, 533 U.S. at 299 n.10.[23] "[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 299. Here, where the lower court concluded that IGRA is "ambiguous" and that Congress did not "even consider" a tribal monopoly, a "clear statement" allowing such a monopoly is missing and IGRA cannot be read to allow this, the Indian canon notwithstanding.[24]

## III. The Court Of Appeals' Opinion Conflicts With This Court's Equal Protection Decisions.

The overarching constitutional issue here is whether Congress can authorize a state to award a major segment of its general economy exclusively to tribes. The court of

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[23] Quoting William N. Eskridge, Jr. & Philip P. Frickey "Quasi-Constitutional Law: Clear Statement Rules on Constitutional Lawmaking," 45 Vand. L. Rev. 593, 597 (1992). *See also, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

[24] *See also, Chickasaw,* which held that the canon is "offset" by the rule that statutes should not be applied to exempt tribes from taxation where Congress has not "clearly expressed" this intent, 534 U.S. at 95, and *Williams v. Babbitt,* 115 F.3d 657, 661 (9th Cir. 1997) (if Congress intended "the total and perpetual conclusion" of non-Indians from a business it normally would "spell out ... its intent").

appeals did not directly deal with this question, the answer to which, under this Court's decisions, must be no.

### A. Tribal preferences are unconstitutional unless "rationally tied to Congress' unique obligation toward the Indians."

Under *Morton v. Mancari*, a tribal preference is regarded as "political" rather than racial, and escapes constitutional disapprobation only if it is "rationally tied to Congress' unique obligations toward the Indians." 417 U.S. at 555. The preference in *Mancari* concerned hiring at the Bureau of Indian Affairs, an agency the Court characterized as "truly sui generis" because of its role in tribal affairs. 417 U.S. at 554. The Court recognized the limited reach of its decision, noting "the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations." 417 U.S. at 554-55. Recently, the Court, recognizing that the *Mancari* preference had a "racial component," described the case as a "limited exception" to the rule against racial preferences. *Rice v. Cayetano*, 528 U.S. at 520.

### B. A casino gaming monopoly is not rationally tied to Congress' unique obligation toward Indians.

Casino gambling does not fall within any category this Court previously has recognized as related to "Congress' unique obligation toward the Indians." Indeed, in an earlier case, the Ninth Circuit itself stated -- contrary to the conclusion reached here -- that an Indian casino monopoly would not relate to such obligation and thus would be unconstitutional. *Williams v. Babbitt*, 115 F.3d at 665.

The only coherent explanation offered for granting tribes a casino monopoly is that it is highly profitable and tribes

need money. But that open-ended justification, supports *any* monopoly worth having. This Court never has accepted economic benefit as a sufficient rationale for an Indian preference, and to do so would ignore the "limited" nature of the *Mancari* exception.

### 1. Casino gambling has no special relationship to Indian society or culture.

Casino gambling was not invented by Indians or historically conducted as part of Indian culture. ER 70, 167-68. As the Ninth Circuit has said, slot machines and casino card games are not "intricately woven into the fabric of [native] social, psychological, and religious life." *Williams v. Babbitt*, 115 F.3d at 664. A tribal casino monopoly is not justified by decisions sustaining Indian preferences that relate to unique features of Indian culture and society. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664-65 (1979) (traditional Indian fishing rights); *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir. 1979) (Indian sale of handmade goods at site of traditional Indian market); *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (religious ceremonies of Native American church); *Gibson v. Babbitt*, 223 F.3d 1256 (11th Cir. 2000) (possession of eagle feathers).

### 2. A casino gambling monopoly is not lawful simply because it is profitable.

Indian casinos are immensely profitable, particularly where competition is prohibited. But that fact, itself, does not provide a sufficient constitutional justification for a tribal gaming monopoly.

Nothing in this Court's case law supports such a sweeping proposition. As noted, *Mancari* allowed a very

limited preference for BIA hiring. In *Rice v. Cayetano*, the Court, recognizing that "the classification [in *Mancari*] had a racial component," characterized *Mancari*'s holding -- that tribal preferences are legitimate if they relate to "Congress' unique obligation toward the Indians" -- as a "limited exception" to the general rule against racial preferences. The Court said: "It does not follow from *Mancari* ... that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all Non-Indian citizens." 528 U.S. at 520. Similarly, "[i]t does not follow from *Mancari* ... that Congress may authorize a State to establish a ... scheme that limits [participation in a business] to a class of tribal Indians, to the exclusion of all Non-Indian citizens." *Id.* at 497[25]

*Mancari* and *Rice* do not justify giving tribes a monopoly over a business simply because it is profitable and thus benefits tribes. Such a rationale would justify

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[25] The court of appeals cited three other decisions by this Court after *Mancari* (but before *Cayetano*). Pet App. 38-41 (citing *Fisher v. District Court*, 424 U.S. 382 (1976); *United States v. Antelope*, 430 U.S. 641 (1977); and *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979) ("*Yakima III*")). None of these decisions support the broad proposition that tribes may be granted any preference that is economically beneficial.

*Fisher* sustained the exclusive jurisdiction of tribal courts over adoption proceedings involving tribal members, a matter uniquely related to Indian tribes. *Antelope* upheld the application of federal rather than state criminal law to a crime committed by a tribal member on Indian land and stands for the unremarkable proposition that, where two different sets of laws exist within two adjacent jurisdictions, there is no equal protection violation. *Yakima III* sustained a state's drawing of boundaries that established where state or tribal law would apply. In none of these cases did a state prescribe a rule allowing tribes to engage in a generic business activity, while prohibiting non-Indians from doing so anywhere in the state.

monopolies of all sorts – for example, automobile dealerships, biotech labs, internet operations -- and greatly alter equal protection jurisprudence.

### 3. A tribal casino monopoly cannot be justified as fostering tribal sovereignty.

The court of appeals wrongly sought to justify California's grant of a tribal casino monopoly on the ground that it furthers the tribes' sovereign interest in "mak[ing] their own decisions about the desirability of gaming operations on Indian lands." Pet. App. 55a.

But Proposition 1A is not confined to activities on Indian land. It governs the legality of casino gaming *throughout the state.* It provides that tribes may conduct casino gambling on Indian land *and* that no one else may do so *anywhere else in the state.*

In this respect, Proposition 1A is dramatically different from the typical federal Indian statutory preference, which gives tribes a preference for activities occurring on Indian land, but does *not* forbid the activities of non-Indians in the rest of a state.[26] Here California has exercised its own sovereignty to enact a single rule applicable throughout the state, including Indian lands, that treats tribes and others

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[26] *Williams v. Babbitt*, 115 F.3d at 664 n.6, lists 29 federal statutes creating Indian preferences for various activities on Indian land. *E.g.*, 42 U.S.C. §§ 1437a(b)(9)-(12) (natives on Indian land eligible for low-income housing). Only one (the statute prohibiting possession of eagle feathers except for Indian religious purposes, 16 U.S.C. § 668a) appears to prohibit activity by non-Indians on non-Indian lands. But that preference has a unique relationship to Indian culture. Casino gaming does not.

differently. Such discrimination cannot be justified as a measure promoting tribal sovereignty on Indian land.[27]

Moreover, it is unrealistic to view tribal casinos as businesses that are conducted solely on Indian land. California tribal casinos advertise extensively throughout the state and run bus services to major metropolitan areas to transport customers. ER 60-61, 78, 160. As the Ninth Circuit observed, "outsiders provide most of the money spent at the casino," and thus tribal casinos do not "involve only tribal members involved in on-reservation conduct." *Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 486-87 (9th Cir. 1998).

To allow tribal monopolies for any business that could be conducted on Indian land would make a mockery of the "limited" nature of the *Mancari* exception. *Cayetano*, 528 U.S. at 520. In recent years new Indian reservations have been approved for sites chosen solely for their value as business property. For example, a casino has been located in the San Francisco Bay Area at a site that had no historical relation to the tribe, but housed a non-Indian, expandable Class II casino. *Artichoke Joe's v. Norton*, 278 F. Supp. 2d 1174 (E.D. Cal. 2003). Similarly, a tribal casino has been placed in suburban Sacramento on land not previously connected to any tribe. *City of Roseville v. Norton*, 219 F. Supp. 2d 130 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1888 (2004). If reservations can be located at whatever site offers the most advantageous business situation -- and if tribal monopolies are allowed for any activity conducted on Indian land -- there is little limit to what is permissible.

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[27] Indeed, in IGRA Congress actually *diminished* tribal sovereignty by giving states the authority (within limits) to decide whether gaming would be allowed on tribal lands. 25 U.S.C. § 2710(d)(1).

### 4. The "vice activity" nature of casino gambling does not justify a tribal monopoly.

The court of appeals sought to limit the broad impact of its holding by distinguishing casino gambling from other economic activity on the ground that casino gambling is a "vice activity." Pet. App. 49a-51a. However, the court failed to explain why a monopoly of a "vice activity" rationally would relate to "Congress' unique obligation toward the Indians" within the meaning of *Mancari*, while a monopoly of any other kind of economic activity would not.

Indeed, there is no meaningful distinction between monopolies of "vice activities" and monopolies of other economic activities in terms of "Congress' unique obligation toward the Indians." Nor is their any other principled basis for a rule that ethnic groups may be given preferences as to "red light district" activities but not otherwise.[28]

The court cited cases according states' wide latitude in fashioning different rules for different localities in regulating "vice activities." *Salsburg v. Maryland*, 346 U.S. 545 (1954) (statute excepting gambling prosecutions in three counties from exclusionary evidence rule); *Philly's Inc. v. Byrne*, 732 F.2d 87 (7th Cir. 1984) (ordinance allowing precincts to vote themselves "dry"); *37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614, 621-22 (6th Cir. 1997) (statute allowing counties to go "dry" by local-option elections). *See also McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding state law excepting one county from ban on sale of certain merchandise on Sunday)

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[28] Also dubious is the notion that Congress, which has guardianship responsibilities to tribes, may allow states to consign "vice activities" to reservations to protect *other* citizens.

In its analysis, however, the court did not consider the basic question whether Congress constitutionally can authorize a tribal monopoly for a generic business that is not uniquely Indian. A state cannot create a tribal preference without lawful Congressional authorization to do so. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. at 500-01. If Congress cannot constitutionally empower states to grant a tribal casino monopoly, questions about a state's implementation of that authority are irrelevant, as are the local option and exemption cases.

Moreover, no case has authorized a state to extend an option or exemption only to jurisdictions chosen because of ethnicity.[29] Rather, the cases acknowledge that any state regulation (including regulation of "vice activity") that singles out a "suspect class" is constitutionally dubious. *See 37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d at 620, 621; *State v. Heretic, Inc.*, 588 S.E.2d 224, 225 (Ga. 2003). And whether a tribal preference is unconstitutional depends on *Mancari*'s "unique obligation" test, whether or not a "vice activity" is involved.

Other conduct besides "vice activities" may be subject to local option restrictions. For example, it is clearly constitutional for states to authorize local jurisdictions to restrict the location of economic activity -- "vice" or not -- to preserve a neighborhood's character. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-90 (1926) (sustaining municipal zoning restrictions barring all industrial use in certain

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[29] And no "local option" case left excluded parties without the option to pursue their economic activities somewhere in the state.

areas).[30] A state's authority to impose local restrictions cannot control here because to so hold would justify tribal monopolies of all sorts, in evident disregard of the "limited" nature of the *Mancari* exception.[31]

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 27, 2004

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[30] *See also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (sustaining California coastal zone management program against federal preemption challenge).

[31] Unquestionably, states may adopt reasonable location restrictions for casino gambling, as they may do regarding any other economic activity. Pet. App. 49a n.20 (quoting *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 192 (1999)). But the state must allow all races an equal opportunity to conduct casino gambling, or any other business, at whatever locations are deemed permissible, if constitutional principles are to be respected.

# APPENDIX

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# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

ARTICHOKE JOE'S; CALIFORNIA GRAND CASINO; FAIRFIELD YOUTH FOUNDATION; LUCKY CHANCES, INC.; OAKS CLUB ROOM; and SACRAMENTO CONSOLIDATED CHARITIES,

*Plaintiffs-Appellants*,

v.

GALE A. NORTON, Secretary of the Interior; JAMES MCDIVITT, Acting Secretary of the Interior; ARNOLD SCHWARZENNEGER,* Governor of California; BILL LOCKYER, Attorney General of California; HARLAN W. GOODSON, Director of the California Division of Gambling Control; John E. Hensley, Chair, California Gambling Control Commission; and MICHAEL C. PALMER, J.K. SASAKI, and ARLO SMITH, Members of the California Gambling Control Commission,

*Defendants-Appellees*

No. 02-165-8
D.C. No.
CV-01-00248-DFL

OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

*The Honorable Arnold Schwarzenegger is substituted for his predecessor, Gray Davis, as Governor of California. Fed. R. App. P. 43(c)(2).

Argued and Submitted
August 14, 2003—San Francisco, California

Filed December 22, 2003

Before: Stephen Reinhardt and Susan P. Graber,
Circuit Judges, and John S. Rhoades, Sr.,** District Judge.

Opinion by Judge Graber

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**The Honorable John S. Rhoades, Sr., Senior Judge, United States District Court for the Southern District of California, sitting by designation.

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## OPINION

GRABER, Circuit Judge:

Plaintiffs are California card clubs and charities that are prohibited under California state law from offering casino-style gaming. They challenge the validity of compacts entered into under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, between the State of California and certain Indian tribes. Pursuant to an amendment to the California Constitution that permits casino-style gaming only on Indian lands ("Proposition 1A"), California has entered into 62 compacts ("Tribal-State Compacts") with Indian tribes allowing such gaming. Plaintiffs brought this action, in federal district court, against various state defendants[1] and the Secretary and Assistant Secretary of the United States Department of the Interior, alleging that Proposition 1A and the Tribal-State Compacts violate IGRA and their rights to equal protection guaranteed by the Fifth and Fourteenth Amendments.[2]

The district court granted summary judgment to both the state defendants and the federal defendants. Because we hold that Proposition 1A and the Tribal-State Compacts are

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[1] The complaint names the following state defendants: the Governor of California, Attorney General of California, the Director of the California Division of Gambling Control, and the members of the California Gambling Control Commission.

[2] The Equal Protection Clause of the Fourteenth Amendment provides a basis for Plaintiffs' equal protection claim against the state defendants. The Due Process Clause of the Fifth Amendment applies to the actions of the federal defendants. Under the "congruence principle" in equal protection jurisprudence, "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (per curiam). We use the term "equal protection" to refer to Plaintiffs' equal protection claims against both the federal and the state defendants.

consistent with IGRA and do not violate the guarantees of equal protection, we affirm.

## BACKGROUND

### A. *The Indian Gaming Regulatory Act ("IGRA")*[3]

In *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), the Supreme Court invalidated an attempt by California to enforce California Penal Code § 326.5 (the "bingo statute") against tribes that operated bingo halls. The Supreme Court characterized the bingo statute as regulatory, rather than criminal, and held that Public Law No. 280 prohibited the enforcement of state regulatory statutes against Indian tribes:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation.

*Cabazon,* 480 U.S. at 209. Because California permitted a substantial amount of gaming activity, including bingo, the bingo statute could not be characterized as criminal or prohibitory and therefore could not be enforced on Indian lands.

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[3] Recently, we decided *Chemehuevi Indian Tribe v. California (In re Indian Gaming Related Cases)*, 331 F.3d 1094 (9th Cir. 2003), *petition for cert. filed,* ___ U.S.L.W. ___ (U.S. Dec. 1, 2003) (No. 03-804). That opinion presents a detailed history of Indian gaming in California both before and after IGRA was enacted. We paraphrase those portions of that history necessary to an understanding of the present dispute.

As a response to the *Cabazon* decision, Congress enacted IGRA as a means of granting states some role in the regulation of Indian gaming. As noted in the opinion below,

> IGRA was Congress' compromise solution to the difficult questions involving Indian gaming. The Act was passed in order to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "to shield [tribal gaming] from organized crime and other corrupting influences to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(1), (2). IGRA is an example of "cooperative federalism" in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.

*Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002) (alteration in original).

IGRA creates three classes of gaming, each of which is subject to a different level of regulation. Class I gaming covers "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class II gaming includes bingo and card games that are explicitly authorized by a state or "not explicitly prohibited by the laws of the State and are [legally] played at any location in the State." *Id.* § 2703(7)(A)(ii). Class II gaming specifically excludes banked card games and slot machines.[4]

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[4] "In banked or percentage card games, players bet against the 'house' or the casino. In 'nonbanked' or 'nonpercentage' card games, the 'house'

At issue in this case is class III gaming, the most heavily regulated and most controversial form of gambling under IGRA. Class III gaming includes "all forms of gaming that are not class I gaming or class II gaming." *Id.* § 2703(8). It includes the types of high-stakes games usually associated with casino-style gambling, as well as slot machines and pari-mutuel horse-wagering. Class III gaming is lawful on Indian lands only if three conditions are satisfied:[5] (1) authorization by an ordinance or resolution of the governing body of the Indian tribe and the Chair of the National Indian Gaming Commission ("NIGC");[6] (2) location in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) the existence

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has no monetary stake in the game itself, and players bet against one another." *Artichoke Joe's*, 216 F. Supp. 2d at 1092 n.3.

[5] IGRA provides that class III Indian gaming must be:

> (A) authorized by an ordinance or resolution that —
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> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
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> (ii) meets the requirements of subsection (b) of this section, and
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> (iii) is approved by the Chairman,
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> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
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> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

25 U.S.C. § 2710(d)(1).

[6] The NIGC is a federal regulatory agency, created by IGRA, that oversees the business of Indian gaming in order to ensure its lasting integrity. The NIGC performs a variety of functions, such as the review of management contracts between tribes and outside parties to run tribal casinos. 25 U.S.C. § 2704.

of a Tribal-State compact approved by the Secretary of the Interior. *Id.* § 2710(d)(1).

IGRA's compacting requirement allows states to negotiate with tribes that are located within their borders regarding aspects of class III Indian gaming that might affect legitimate state interests. *Id.* § 2710(d)(3)(C). The compacting process gives to states civil regulatory authority that they otherwise would lack under *Cabazon,* while granting to tribes the ability to offer legal class III gaming. *Keweenaw Bay Indian Cmty. v. United States,* 136 F.3d 469, 472 (6th Cir. 1998). IGRA also imposes on states an obligation to conduct compact negotiations in good faith, 25 U.S.C. § 2710(d)(3)(A), and allows tribes to enforce that obligation in federal court, *id.* § 2710(d)(7)(A).[7]

B. *California's Regulation of Indian Gaming Under IGRA*

After the enactment of IGRA, certain Indian tribes in California sought to negotiate compacts with the State to permit the operation of class III gaming on their reservations. The class III games over which the tribes sought to negotiate—live banked or percentage card games and stand-alone electronic gaming machines (similar to slot machines)—were not permitted under California law. *See* Cal. Penal Code §§ 330, 330a, 330b. However, California did allow other forms of class III gaming, such as nonelectronic keno and lotto. *Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250, 1255 n.1 (9th Cir. 1996).

During the administration of Governor Pete Wilson,

[7] Although the Supreme Court invalidated this provision of IGRA in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), on Eleventh Amendment grounds, California has consented to such suits by waiving sovereign immunity expressly. Cal. Gov't Code § 98005.

California refused to negotiate with tribes with respect to the forms of gaming that they sought to conduct. Because the State did not permit live banked or percentage card games or slot machine-like devices, it took the view that it had no obligation to negotiate with respect to those games or devices. The tribes argued that, because the State permitted other types of class III games, it could not refuse to negotiate over a particular subset of class III games. *See Mashantucket Pequot Tribe v. Connecticut,* 913 F.2d 1024, 1030 (2d Cir. 1990) (agreeing with the tribe's position). In *Rumsey,* this court rejected the tribes' view, holding that

> IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. Instead, the statute says only that, if a state allows a gaming activity "for any purpose by any person, organization, or entity," then it also must allow Indian tribes to engage in that same activity. 25 U.S.C. § 2710(d)(1)(B). In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others can-not have.

64 F.3d at 1258.

The *Rumsey* decision meant that the State of California had no obligation under federal law to negotiate with the tribes over the class III gaming that the tribes wanted to operate. The tribes thus resorted to California's initiative process to impose a state-law obligation on California to negotiate class III gaming compacts. A coalition of California tribes drafted Proposition 5, which required the State to enter into a model class III gaming compact covering banked card games and slot machines. The Proposition required the Governor to execute compacts within 30 days after any federally recognized Indian tribe requested such an arrangement. If the Governor took no action within 30 days, the compacts were deemed approved.

*Flynt v. Cal. Gambling Control Comm'n,* 129 Cal. Rptr. 2d 167, 176 (Ct. App. 2002), *cert. denied,* 124 S. Ct. 398 (2003); Cal. Gov't Code §§ 98000-98012. Proposition 5 also contained a provision waiving California's sovereign immunity to suits brought under IGRA. *See id.* § 98005.

After the passage of Proposition 5 on the November 1998 ballot, the Hotel Employees and Restaurant Employees International Union filed a petition for a writ of mandate in the California Supreme Court, seeking to prevent the Governor from implementing the Proposition. The union alleged that Proposition 5 violated Article VI, Section 19(e) of the California Constitution, which states that the "Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey." The California Supreme Court agreed with the union and issued a peremptory writ of mandate, preventing the Governor from implementing Proposition *5. Hotel Employees & Rest. Employees Int'l Union v. Davis,* 981 P.2d 990, 1011 (Cal. 1999).

Before the California Supreme Court ruled in *Hotel Employees,* Governor Gray Davis took office and sought to negotiate class III gaming compacts with several Indian tribes in California. However, once the California Supreme Court issued its ruling, the State no longer had authority to execute the compacts. To address this problem, the Davis administration proposed an amendment to the California Constitution that would exempt Indian tribes from the State's constitutional prohibition on class III gaming. The Davis administration and various Indian tribes continued to negotiate Tribal-State Compacts, adding a provision that conditioned execution of the compacts on ratification of the proposed state constitutional amendment. In September of 1999, the Governor concluded 57 compacts with Indian tribes. The California legislature quickly ratified all 57 compacts. *Artichoke Joe's,* 216 F. Supp. 2d at 1096.

In March of 2000, California voters ratified Proposition 1A, amending the California Constitution to provide:

> Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percent-age card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

Cal. Const. art. IV, § 19(f). Shortly after the ratification of Proposition 1A, the Assistant Secretary of Indian Affairs approved the compacts on behalf of the Secretary of the Interior ("Secretary"). He concluded that "[t]he Governor can, consistent with the State's amended Constitution, conclude a compact giving an Indian tribe, along with other California Indian tribes, the exclusive right to conduct certain types of Class III gaming." Upon this approval, the Tribal-State Compacts went into effect.

The compacts "create a unique opportunity for [each] Tribe to operate its Gaming Facility in an economic environment free of competition from the Class III gaming . . . on non-Indian lands in California." Tribal-State Compact Between the State of California and the Augustine Band of Mission Indians (Mar. 15, 2000), pmbl. E. The compacts condition the operation of class III gaming facilities on tribes' ' agreeing to certain revenue-sharing arrangements and paying into a "Special Distribution Fund," which is used by certain state agencies to cover expenses related to Indian gaming. Since the original 57 compacts took effect, 5 additional compacts have been entered into by the Governor and approved by the Secretary. *Artichoke Joe's,* 216 F.

Supp. 2d at 1096. At present, 39 of the 62 tribes with compacts operate casinos with slot machines. Casinos have become the main source of revenue for Indian tribes in California. Some 44 California tribes are still without compacts, however. *Id.*

C. *District Court Proceedings*

Under Proposition 1A, Indian tribes are the only entities that are permitted to conduct class III gaming in California. California law does not bar non-Indian gaming altogether, however. Player-banked games, such as poker, are permitted in card rooms that generally charge membership fees or hourly rates. Also, California allows charities to engage in bingo for fundraising. Plaintiffs—non-Indians who are currently conducting gaming operations within those regulations—brought this action to challenge the Indians' exclusive right to conduct class III gaming. Plaintiffs' gaming operations are not nearly as lucrative as the gaming allowed to tribes. Plain-tiffs allege that allowing only Indians to conduct casino gaming violates IGRA and Plaintiffs' right to equal protection under the Fifth and Fourteenth Amendments.

Plaintiffs sought declaratory and injunctive relief on four counts of their complaint. Count One charged the federal defendants, namely, the Secretary and Assistant Secretary of the Interior, with violating IGRA and the Fifth Amendment's guarantee of equal protection by approving California's Tribal-State Compacts.[8]

Count Two sought similar relief under 42 U.S.C. § 1983 against Governor Gray Davis, the Director of the California

[8] Count One of Plaintiffs' complaint also included a claim that the Secretary's approval of the Tribal-State Compacts violated the Administrative Procedure Act, 5 U.S.C. §§ 701-706. The district court granted Defendants' motion for summary judgment on that claim, and Plaintiffs do not appeal that ruling.

Division of Gambling Control, and the Chair and Members of the California Gambling Control Commission. Plaintiffs alleged that Proposition 1A and the Tribal-State Compacts violate both IGRA and the Fourteenth Amendment's Equal Protection Clause. Plaintiffs sought to invalidate the current Tribal-State Compacts and to bar the Governor from entering into any future Tribal-State compacts ("Prospective Compacts"). Count Three also targeted Prospective Compacts; Plaintiffs sought to enjoin the state defendants from passing legislation thought to precede a compact with the Lytton Band, a tribe that Plaintiffs expected would build a casino near San Francisco.

Finally, in Count Four, Plaintiffs sought to enjoin California's Attorney General, the Director of the California Division of Gambling Control, and the Chair and Members of the California Gambling Control Commission from prosecuting Plaintiffs under the relevant sections of the penal code that proscribe casino-style gaming, so long as the Tribal-State Compacts remain in effect.

The district court held that it had "jurisdiction to resolve the claims against the federal defendants, the claims against the Governor related to existing compacts, and the claims against the State Attorney General and the Director of the California Division of Gambling Control as to the enforcement of state gaming laws against plaintiffs." *Artichoke Joe's,* 216 F. Supp. 2d at 1090. However, the court dismissed Count Three and Plaintiffs' ' other claims as to the Prospective Compacts on the ground that Plaintiffs had failed to demonstrate that they faced an "immediate and imminent" threat of harm from the Prospective Compacts. *Id.* at 1103. The court also dismissed the California Gambling Control Commission from Counts Two and Four, finding that Plaintiffs had not demonstrated that the threat of

enforcement was fairly traceable to the Commission.[9]

On the merits, the district court determined that Proposition 1A satisfies IGRA's requirement that a state "permit" class III gaming "for any purpose, by any person, organization, or entity." *Id.* at 1128. The court went on to decide that granting Indian tribes a monopoly on class III gaming does not violate the Fifth or the Fourteenth Amendment's guarantee of equal protection. *Id.* at 1132-33. The district court therefore granted Defendants' motion for summary judgment.[10] *Id.* at 1133.

This timely appeal followed.

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[9] No party appeals the district court's rulings regarding justiciability. We agree with the district court's cogent application of U.S. Supreme Court precedent regarding constitutional standing, *Artichoke Joe's,* 216 F. Supp. at 1100-09, and thus do not address Plaintiffs' claims as to the Prospective Compacts or their claims against the Gambling Control Commission.

[10] In the district court, amicus curiae California Nations Indian Gaming Association argued that Plaintiffs' ' complaint must be dismissed for failure to join California's Indian tribes as indispensable parties under Federal Rule of Civil Procedure 19. In the absence of exceptional circumstances, which are not present here, we do not address issues raised only in an amicus brief. *Swan v. Peterson,* 6 F.3d 1373, 1383 (9th Cir. 1993).

We note, however, that this case is distinguishable from an earlier challenge to the validity of gaming compacts entered into by the Governor of Arizona pursuant to IGRA. *Am. Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015 (9th Cir. 2002). We held there that the State of Arizona could not adequately represent the tribes because their interests were potentially adverse and because the state owed no trust responsibility to Indian tribes. *Id.* at 1024 n.5. By contrast, the Secretary is a party to this case. The Secretary's interests are not adverse to the tribes' interests and the Department of Interior has the primary responsibility for carrying out the federal government's trust obligation to Indian tribes.

## STANDARD OF REVIEW

We review de novo a grant of summary judgment. *Robi v. Reed,* 173 F.3d 736, 739 (9th Cir. 1999). We also review de novo questions of statutory interpretation, *Lopez v. Wash. Mut. Bank,* 302 F.3d 900, 903 (9th Cir. 2002), and questions of the constitutionality of a federal statute, *Mayweathers v. Newland,* 314 F.3d 1062, 1066 (9th Cir. 2002), *cert. denied,* 124 S. Ct. 66 (2003).

## ANALYSIS

### A. *Validity of Proposition 1A and the Tribal-State Compacts Under IGRA and the Johnson Act*[11]

**[1]** Assessing whether Proposition 1A and the Tribal-State Compacts violate IGRA requires us to interpret 25 U.S.C. § 2710(d)(1)(B), IGRA's provision regulating class III gaming on Indian lands. "We interpret a federal statute by ascertaining the intent of Congress and by giving effect to its legislative will." *Ariz. Appetito's Stores, Inc. v. Paradise Vill. Inv. Co. (In re Ariz. Appetito's Stores, Inc.),* 893 F.2d 216, 219 (9th Cir. 1990). " 'We begin, as always, with the language of the statute.' " *Navajo Nation v. Dep't of Health & Human Servs.,* 325 F.3d 1133, 1136 (9th Cir. 2003) (en banc) (quoting *Duncan v. Walker,* 533 U.S. 167, 172 (2001)). "When the words of a statute are unambiguous, . . .

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[11] The Johnson Act, 15 U.S.C. §§ 1171-1178, prohibits the possession or use of "gambling device[s]," including slot machines, within Indian country. *Id.* § 1171(a). IGRA waives application of the Johnson Act if the slot-machine gaming is conducted under an effective Tribal-State compact that "is entered into . . . by a State in which gambling devices are legal." 25 U.S.C. § 2710(d)(6). Whether slot machines are legal in California depends on the validity of Proposition 1A under IGRA, so the Johnson Act analysis is subsumed by the analysis, below, of the "permits such gaming" provision of § 2710(d)(1)(B).

judicial inquiry is complete." *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 254 (1992) (internal quotation marks omitted). "Where the language is not dispositive, we look to the congressional intent revealed in the history and purposes of the statutory scheme." *United States v. Buckland,* 289 F.3d 558, 565 (9th Cir. 2002) (en banc) (internal quotation marks omitted).

1. *Statutory Text*

**[2]** The parties dispute the proper construction of 25 U.S.C. § 2710(d)(1)(B), which provides that "[c]lass III gaming activities shall be lawful on Indian lands only if such activities are . . . (B) located in a State that permits such gaming for any purpose by any person, organization, or entity." Construing this provision involves two separate but related questions of interpretation. First, we must decide whether Proposition 1A, which permits class III gaming only on Indian lands, is consistent with § 2710(d)(1)(B)'s requirement that a State be one that "permits such gaming" before a class III gaming compact may take effect. Then we must decide whether "any person, organization, or entity" should be read to exclude Indian tribes. To resolve these questions, we examine the text both in isolation and in the context of the statute as a whole.

(a) *"permits such gaming"*

In construing the phrase "permits such gaming" in § 2710(d)(1)(B), we are mindful of cases that characterize as "patent bootstrapping" the notion that a Tribal-State compact can satisfy both the "permits such gaming" requirement under § 2710(d)(1)(B) and the compact requirement under § 2710(d)(1)(C). *See Citizen Band Potawatomi Indian Tribe of Okla. v. Green,* 995 F.2d 179, 181 (10th Cir. 1993) (holding that a Tribal-State compact allowing the importation of gambling devices onto a tribe's lands violated the Johnson

Act because, standing alone, the compact could not satisfy § 2710(d)(1)(B)'s "permits such gaming" requirement); *United States v. Santa Ynez Band of Chumas Mission Indians of the Santa Ynez Reservation,* 33 F. Supp. 2d 862 (C.D. Cal. 1998) (describing games that are illegal under state law as "uncompactable"). However, Proposition 1A distinguishes the present controversy from the "bootstrapping" cases. Proposition 1A does more than authorize the Governor to enter into Tribal-State compacts. It explicitly states that "slot machines, lottery games, and banking and percentage card games *are hereby permitted* to be conducted and operated on tribal lands" subject to the regulations embodied in the Tribal-State compact. Proposition 1A (emphasis added). Thus, there is law —separate from the compact itself—that "permits such gaming" in certain circumstances. 25 U.S.C. § 2710(d)(1)(B).

Plaintiffs argue that, because California has no authority to "permit" gaming on Indian lands under *Cabazon,* "permits such gaming" can refer only to the State's ability to regulate gaming operations conducted on *non-Indian* lands. When enacting IGRA, Plaintiffs contend, Congress would have known that the State, acting alone, could not "permit" class III gaming on Indian lands and, thus, that a state law providing for class III gaming conducted only by Indian tribes on Indian lands could not satisfy the requirement of § 2710(d)(1)(B). This argument is plausible but does not foreclose an alternative understanding of the verb "permit," for three reasons: (1) Under *Cabazon,* California did not lack jurisdiction to apply its *prohibition* on class III gaming on Indian lands before IGRA was enacted; (2) at the same time Congress passed IGRA, it gave California the regulatory authority that *Cabazon* took away, 18 U.S.C. § 1166; and (3) we have not construed IGRA's use of the word "permit" to require a legally binding affirmative act, *see Rumsey,* 64 F.3d at 1257.

Under *Cabazon,* the Supreme Court applied the long-standing general rule that a state has jurisdiction over Indian

lands only if Congress has explicitly ceded that jurisdiction. 480 U.S. at *207. But see id.* at 214-15 (explaining exceptions in which a state may exercise jurisdiction without an express congressional mandate). California claimed that it had jurisdiction over gaming activities on Indian lands pursuant to authority ceded by Public Law No. 280, which conferred "broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State." *Id.* at 207. Because California permitted some of the gaming at issue, however, with violations of the law deemed to be mere misdemeanors, the Supreme Court concluded that the statutes actually were regulatory rather than prohibitory (or criminal) in nature. Public Law No. 280 did not confer jurisdiction on the State to regulate gaming and, thus, California could not base its jurisdiction on that statute. Nonetheless, the general criminal jurisdiction that California exercises under Public Law No. 280 allowed California to prohibit gaming for Indian tribes, if the scheme was prohibitory rather than regulatory. *Id.* at 208. Therefore, pre-IGRA and *post-Cabazon,* California still had *some* jurisdiction over Indian lands pertaining to gaming.

IGRA changed the landscape but did not divest California of its general *criminal* jurisdiction over Indian lands. Rather, it devised a method to give back some of the *regulatory* authority that the Supreme Court had held inapplicable to Indian lands in *Cabazon.* One of the bases of the holding in *Cabazon* was that Congress had not explicitly ceded regulatory authority for gaming to the states in Public Law No. 280 or otherwise. IGRA responded by creating a statutory basis for gaming regulation that introduced the compacting process as a means of sharing with the states the federal government's regulatory authority over class III gaming. *Cabazon,* 480 U.S. at 207-14; 25 U.S.C. §§ 2702(1), 2710(d)(1). Simultaneously, IGRA put into effect 18 U.S.C. § 1166, which provides that "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions

applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 U.S.C. § 1166(a). The federal government retained the power to prosecute violations of state gambling laws in Indian country, so as to preserve the delicate balance of power between the States and the tribes. *See Sycuan Band of Mission Indians v. Roache,* 54 F.3d 535, 538 (9th Cir. 1995) (explaining the limit on a state's "jurisdiction" to enforce the gambling laws that extend into Indian lands). However, the fact that the federal government retained that power does not change the fact that California may enact laws and regulations concerning gambling that have an effect on Indian lands via § 1166. *See United States v. E.C. Invs., Inc.,* 77 F.3d 327, 330-31 (9th Cir. 1996) (discussing the relation-ship between state law and exclusive federal enforcement power in § 1166(d)).

Further, our decision in *Rumsey* supports a construction of the phrase "permits such gaming" under which California could "permit" gaming on Indian lands both before and after the ratification of Proposition 1A. *Rumsey* held that, in the statute at issue, "permit" had a clear and unambiguous meaning. 64 F.3d at 1257. "In *United States v. Launder,* 743 F.2d 686[, 689] (9th Cir. 1984), we adopted a [Black's Law D]ictionary definition of the term 'permit' as meaning ' "[t]o suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act." ' " *Rumsey,* 64 F.3d at 1257. In other words, under *Rumsey,* the word "permit" in this statute does not necessarily require an affirmative act of legal authority in order to "permit" conduct. California may "permit" class III gaming within the meaning of IGRA even if it "acquiesces, by failure to prevent" class III gaming. Under *Rumsey,* mere tolerance of class III gaming might be enough to satisfy § 2710(d)(1)(B)'s requirement that a state "permit[ ] such gaming for any purpose by any person, organization, or entity." § 2710(d)(1)(B).

Plaintiffs are quick to point out that *Rumsey* dealt with a

state's obligation to negotiate under IGRA, rather than the limits of a state's negotiating authority in the compacting process. Indeed, most cases interpreting § 2710(d)(1)(B) have done so in the context of addressing a state's duty to negotiate with a tribe concerning class III gaming. *See, e.g, Rumsey,* 64 F.3d at 1258; *Cheyenne River Sioux Tribe v. South Dakota, 3* F.3d 273, 279 (8th Cir. 1993) (construing the phrase "such gaming" in § 2710(d)(1)(B) in deciding whether the state had to negotiate with the tribes about traditional keno); *Mashantucket Pequot Tribe,* 913 F.2d at 1029-31 (construing the same provision in deciding which games were subject to negotiation). However material, this distinction does not *compel a* reading of "permits such gaming" that requires California to legalize non-Indian class III gaming before executing valid compacts under IGRA.

**[3]** We are still left, then, with a statutory provision that is susceptible to more than one interpretation. Neither the statutory text read in isolation nor judicial constructions of it resolve the ambiguity.

(b) "any person, organization, or entity"

**[4]** We reach a similar conclusion with respect to the requirement of § 2710(d)(1)(B) that a state permit class III gaming by "any person, organization, or entity." There is nothing in the text itself that definitively resolves whether Congress intended Indian tribes to fall within the scope of "any person, organization, or entity" under this provision.

Plaintiffs interpret this phrase in § 2710(d)(1)(B) to exclude Indian tribes from "any person, organization, or entity," because they read the subsection simply as a "most-favored nations" clause. If no other class III gaming is permitted in a state, they contend, then federal law bars Indians from con-ducting such gaming. Under this

construction, § 2710(d) (1)(B) merely places Indians on an equal footing with other gambling businesses in the state. As *Rumsey* put it, after citing § 2710(d)(1)(B), "a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have." 64 F.3d at 1258; *see also* 18 U.S.C. § 1166(a) (providing that state laws on gambling "shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State"). There is no statutory provision expressly allowing States to enter into exclusive arrangements with Indian tribes. Plaintiffs reasonably interpret IGRA as a statute that is intended to maintain a competitive balance between Indian and non-Indian gaming interests under California and federal law.

Defendants, on the other hand, construe "any person, organization, or entity" to include Indian tribes. Looking only to the text itself, the breadth of the provision does suggest that it is meant to be read inclusively; "permits such gaming *for any purpose* by *any person, organization, or entity"* does not lend itself to easy circumscription. 25 U.S.C. § 2710(d)(1)(B) (emphasis added). The statute does not explicitly exclude Indians from its scope. And *Rumsey* did not hold that a state *may* not give tribes what others do not have, but only that a state *need* not do so. 64 F.3d at 1258.

As the district court noted, Congress employed "capacious language" to define those situations in which it would be legal for Indian tribes to conduct class III gaming operations on Indian lands. *Artichoke Joe's,* 216 F. Supp. 2d at 1121. Nonetheless, the parties' ' textual dispute ultimately reduces to what the statute does *not* say. Because the statute does not explicitly exclude Indians from the phrase "any person, organization, or entity," Defendants read IGRA to allow state-law provisions legalizing class III gaming monopolies on Indian lands to satisfy the requirements of §

2710(d)(1)(B). Because the statute does not expressly permit Indian tribes to run class III gaming enterprises as a monopoly, Plaintiffs read § 2710(d)(1)(B) to require states to permit class III gaming for any purpose by any *non-Indian* person, entity, or organization.

Looking to past judicial constructions of the text, Defendants have somewhat the better of the argument. In the con-text of deciding whether California could condition approval of a Tribal-State compact on a tribe's agreement to certain revenue-sharing and employment provisions, we said that the core of the compact between Indian tribes and the State is the exchange of "the exclusive right to conduct lucrative Las Vegas-style class III gaming, free from non-tribal competition" for the tribes' agreement "to a number of restrictions and obligations concerning their gaming enterprises."[12] *In re Indian Gaming Related Cases,* 331 F.3d at 1104. An Arizona district court reached a similar result in a case deciding that a Tribal-State compact, standing alone, cannot legalize Indian gaming under IGRA. The court read § 2710(d)(1)(B) to require a state to "first legalize a game, *even if only for tribes,* before it can become a compact term." *Am. Greyhound Racing, Inc. v. Hull,* 146 F. Supp. 2d 1012, 1067 (D. Ariz. 2001), *vacated on other grounds,* 305 F.3d 1015 (9th Cir. 2002) (emphasis added). Similarly, the California Supreme Court, adopting the reasoning of the district court in the present case, has construed § 2710(d)(1)(B) to allow tribal monopolies of class III gaming activities.[13] *See Flynt,* 129

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[12] Exclusivity figures prominently in this exchange. Section 12.4 of the compact grants the tribes a right to terminate the compact "in the event the exclusive right of Indian tribes to operate Gaming Devices in California is abrogated by the enactment, amendment, or repeal of a state statute or constitutional provision" or by judicial decision. *See In re Indian Gaming Related Cases,* 331 F.3d at 1104 n.13.

[13] Connecticut and New York have also granted to Indian tribes monopolies on class III gaming, conditioned on revenue-sharing

Cal. Rptr. 2d at 178. Although the trend of judicial construction of § 2710(d)(1)(B) slightly favors Defendants' view, none of the cases controls the issue before us.

(c) *The subsection and the statute as a whole*

Reading 25 U.S.C. § 2710(d)(1)(B) in the light of IGRA as a whole also fails to resolve the ambiguity conclusively. Looking both to similar text used elsewhere in the statute and to other operational text addressing the application of state law on tribal lands, we find potentially relevant provisions supporting each party's interpretation of § 2710(d)(1)(B).

IGRA uses identical text to govern whether tribes may engage in class II gaming under § 2710(b)(1)(A). A tribe may conduct class II gaming operations only if that tribe is "located within a State that permits such gaming for any purpose by any person, organization or entity." Plaintiffs argue that the absence of a compacting process for class II gaming shows that the verb "permits" must refer to what states allow on non-Indian lands. They then cite the familiar canon of construction that identical text appearing more than once in the same statute is presumed to have the same meaning. *See Batjac Prods., Inc. v. Goodtimes Home Video Corp.*, 160 F.3d 1223, 1228-29 (9th Cir. 1998). However, this argument begs the question whether a state could permit class II gaming only on Indian lands, even without a compacting process.

Other sections of the statute that employ text similar to the phrase "any person, organization, or entity" in § 2710(d)(1)(B) lend support both to Plaintiffs' and

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agreements. *See* Gatsby Contreras, Note, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal Taxation?*, 5 J. Gender Race & Just. 487, 496-500 (2002) (canvassing various tribal-state exclusivity and revenue-sharing models).

Defendants' interpretations of that text. Section 2710(d)(2)(A) provides that, "[i]f any Indian tribe proposes to engage in, *or to authorize any person or entity* to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chair-man an ordinance or resolution that meets the requirements of" § 2710(b). (Emphasis added.) In this provision, the term "any person or entity" implicitly excludes Indian tribes. Other subsections, however, qualify the phrase "any person or entity" when it is meant to exclude Indian tribes. Thus, for example, § 2710(d)(4) restricts a state's ability to tax gaming activities. It states that IGRA should not be read to authorize the imposition of "any tax, fee, charge, or other assessment upon an Indian tribe or upon any *other* person or entity authorized by an Indian tribe to engage in class III activity." (Emphasis added.) Section 2710(b)(4)(A) also qualifies "any person or entity" with the phrase "other than the Indian tribe" when distinguishing between Indian and non-Indian entities. These qualifiers suggest that the unadorned phrase "any per-son or entity" includes Indian tribes.

Looking to other operative text in the statute that addresses the applicability of state law on tribal lands, we again find support for both of the proposed interpretations. Section 2710(b)(4)(A) states that tribal licensing requirements for class II gaming operations must be "at least as restrictive as those established under State law governing *similar gaming within the jurisdiction of the State* within which such Indian lands are located." (Emphasis added.) Read narrowly, this text supports the notion that Congress was legislating with the assumption in mind that existing state law would apply to tribal gaming operations—at least insofar as class II gaming is concerned. Read broadly, the text supports Plaintiffs' interpretation that IGRA confers "most favored nation" status on Indian tribes.

Section 2710(d)(5) seems to carry the same assumption to the context of class III gaming, stating that

> [n]othing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact . . . .

In establishing consistency between state and tribal gaming regulations, Congress apparently assumed the existence of state regulation of class III gaming.

Finally, 18 U.S.C. § 1166 establishes federal jurisdiction over violations of state gaming laws on Indian lands. Section 1166(a) states that, "for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." This provision suggests that existing state law is expected to apply to both Indian and non-Indian gaming activities. However, § 1166(c)(2), by excluding class III gaming operations conducted under Tribal-State compacts from the term "gambling" in § 1166(a), expressly carves out such operations from this jurisdictional scheme.

**[5]** In summary, an examination of IGRA as a whole fails to resolve the ambiguities inherent in 25 U.S.C. § 2710(d)(1)(B). We thus turn to sources outside the operative statutory text.

2. *Congressional Findings, Purpose, and Legislative History*

As is true of the operative text, Congress' ' statements of intent in enacting IGRA, and IGRA's legislative history, leave us in equipoise between the parties' competing interpretations of the statute. Both Plaintiffs and Defendants find support for their respective positions, but no party has

directed our attention to, nor can we find, any statement of intent or legislative history that clearly demonstrates that Congress even considered the question before us.

The official legislative history of IGRA—the formal record of the Select Committee Report and the subsequent floor debates—is silent on the specific issue of tribal monopolies on class III gaming. This silence does not definitively favor either interpretation of IGRA although, as the district court noted, silence does suggest that tribal gaming monopolies were not at "the forefront of what Congress had in mind." *Artichoke Joe's,* 216 F. Supp. 2d at 1121. "Drawing inferences as to congressional intent from silence in legislative history is always a precarious business." *Symons v. Chrysler Corp. Loan Guarantee Bd.,* 670 F.2d 238, 242 (D.C. Cir. 1981).

The legislative history conveys quite clearly that Congress devised the Tribal-State compacting process as a means to resolve the most contentiously debated issue in the legislation: which authority—Tribal, State, or Federal—would regulate class III gaming. S. Rep. No. 100-446, at 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76. Indian tribes resisted ceding any authority over gaming to the states. *Id.* at 13, *reprinted* at 3083. The states, on the other hand, resisted tribally or federally regulated class III gaming, especially because many states already had in place regulatory systems for such gaming. *Id.* IGRA's drafters conceived of the Tribal-State compact as "the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises." *Id.*

The legislative history thus shows that Congress looked to the compacting process primarily as a means of balancing state and tribal interests. The Select Committee's articulation of these interests refers only obliquely to the economic concerns of third parties:

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. . . . A tribe's governmental interests include raising revenues to pro-vide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as *impacts on the State's* regulatory system, including its *economic interest in raising revenue for its citizens.*

*Id.* (emphasis added). Recognition of the interests of non-Indians is implied, but only as a consideration for the state, not for Congress directly.

Plaintiffs direct our attention to parts of the legislative history showing that Congress intended to preserve an environment of free-market competition among entities engaged in class III gaming. Although the notion of free-market competition does appear in the legislative history, it figures most prominently in the context of warning states not to abuse the compacting process to protect non-Indian gaming interests: "It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes." *Id.*

This is not to say that the statute's effect on existing gaming interests was entirely absent from Congress'

deliberations. The Select Committee on Indian Affairs stated that IGRA "allows States to consider negative impacts on existing gaming activities." *Id.* at 14, *reprinted* at 3084. However, the legislative history seems simply to *assume* (rather than affirmatively to *require)* existing, competitive gaming activities. Congress intended that IGRA not "allow States to reject Indian gaming on the mere showing that Indian gaming will compete with non-Indian games. Rather, States must show that economic consequences will be severe and that they will clearly out-weigh positive economic consequences." *Id.*

Other portions of the legislative history suggest that Congress enacted IGRA with the assumption that States would use laws and regulatory systems that police *extant* class III gaming operations to regulate similar operations on tribal lands. One goal of IGRA is to "foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied." *Id.* at *6, reprinted* at 3076. The Justice Department opposed the creation of a federal agency to regulate class II and class III gaming activity because, in the Department's view, "the expertise to regulate gaming activities and to enforce laws related to gaming could be found in state agencies." *Id.* at 5, *reprinted* at 3075.

Congress shared the Justice Department's concern about the effect of tribal class III gaming operations on existing state regulatory systems. The Select Committee noted "the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands." *Id.* at 13, *reprinted* at 3083. Its admonition to the states not to use compact negotiations to protect "other State-licensed gaming enterprises," *id.,* from competition with Indian tribes also reveals the assumption that the class III gaming compacts would be concluded in states with laws and agencies that regulate existing non-Indian class III gaming operations.

Other portions of the legislative history support Defendants' interpretation. We first note that any express congressional consideration of non-Indian gaming interests in the text of IGRA seems to have fallen out as Congress worked through competing drafts of the legislation. As introduced, Senate Bill 555 contained text that provided explicitly for the interpretation that Plaintiffs urge here. Section 11(d)(1) and (2) provided:

> (1) Except as provided in paragraph (2) of this subsection, class III gaming shall be unlawful on any Indian lands under section 1166 of title 18, United States Code.
>
> (2)(A) *A gaming activity on Indian lands that is otherwise legal within the State where such lands are located* may be exempt from the operation of paragraph (1) of this subsection where the Indian tribe requests the Secretary to consent to the transfer of all civil and criminal jurisdiction, except for taxing authority, pertaining to the licensing and regulation of gaming over the proposed gaming enterprise to the State within which such gaming enterprise is to be located and the Secretary so consents.

133 Cong. Rec. 3740 (1987) (emphasis added). The final version of S.B. 555, however, uses the current, broader text. The current text originated in S.B. 1303, a bill that ultimately failed in committee. *Id.* at 14332, § 10(b). The fact that the "permits such gaming" text was taken from another bill suggests that the substitution was deliberate, and the particular substitution that the drafters chose implies that Congress intended a broader meaning than the one proposed by Plaintiffs.

Further, at least one individual legislator did recognize a preference for Indian gaming. In his separate statement

following the Select Committee Report, Senator Evans observed that

> Indian tribes may have a competitive economic advantage because, rightly or wrongly, many states have chosen not to allow the same types of gaming in which tribes are empowered to engage. Ironically, the strongest opponents of tribal authority over gaming on Indian lands are from States whose liberal gaming policies would allow them to compete on an equal basis with the tribes.

S. Rep. No. 100-446, at 36, *reprinted* at 3105. Although not dispositive as to Congress' view of class III gaming monopolies, Senator Evans' comments do show that at least one legislator, and perhaps other interested parties as well, viewed Indian monopolies as a possibility under IGRA.

IGRA's stated purposes also tend slightly to favor Defendants' interpretation. Section 2702 provides that IGRA's purpose is

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players[.]

25 U.S.C. § 2702.[14] Those stated purposes address the Indian

[14] A third stated purpose is to set up the National Indian Gaming Commission. 25 U.S.C. § 2702(3).

tribes' interests in matters related to their autonomy and the State's interest in the prevention of crime. Nowhere is there any reference to the idea that IGRA serves as a means of policing equality between Indian and non-Indian gaming operations in the context of class III gaming. At the same time, Congress' interests in tribal self-sufficiency and self-government do not necessarily translate into approval of state-wide gaming monopolies.

The statement of congressional findings in § 2701 is similarly ambiguous:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

*Id.* § 2701(5). One way to interpret this section is to note that Congress wanted to grant to Indian tribes an "exclusive right," a right unavailable to non-Indian gaming interests, and to read "such gaming activity" to refer back to the entire phrase "gaming activity on Indian lands." This reading favors Defendants. It is equally possible, however, to read this section to say that the only "exclusive right" granted is the right "to regulate gaming activity on Indian lands" and thus to read "such gaming activity" to refer back only to the remaining phrase "the gaming activity" which, in general, must be a type of gaming activity that a state does not prohibit. This reading favors Plaintiffs.

**[6]** In sum, an examination of the legislative history and IGRA's stated purposes does not resolve the ambiguities in the operative text. Both Plaintiffs' interpretation and Defendants' interpretation remain plausible. We therefore turn to other interpretive aids.

### 3. *The* Blackfeet Tribe *Presumption*

**[7]** Ambiguity in a statute that is enacted for the benefit of Indians implicates a well-known canon of construction. In *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759 (1985), the Supreme Court held that "the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, '[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.' " *Id.* at 766 (quoting *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985)). The Court then described the two canons of construction that apply specially in Indian law, one of which is that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.*

**[8]** This presumption, also known as the trust doctrine, grew out of the trust obligation that Congress owes to Indian tribes. Initially, the presumption was applied in the context of Indian treaties as a counterbalance to Congress' ability to abrogate a treaty obligation unilaterally without a tribe's con-sent. *See* Felix S. Cohen's Handbook of Federal Indian Law 221-23 (2d ed. 1982) (collecting cases). Later decisions extended this presumption beyond the context of Indian treaties to land disputes, *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R.,* 314 U.S. 339 (1941); state jurisdiction to tax, *Bryan v. Itasca County,* 426 U.S. 373 (1976); and the application of the Bill of Rights to tribes in matters of self-government, *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978).[15]

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[15] Recently, we applied *a Blackfeet* presumption in deciding whether the Age Discrimination in Employment Act of 1967 ("ADEA") applies to the relationship between a tribal housing authority, which supplies affordable housing solely on tribal trust lands, and its employees. *EEOC v. Karuk Tribe Hous. Auth.,* 260 F.3d 1071, 1082 (9th Cir. 2001). Traditional rules of statutory construction were consistent with the claim

The *Blackfeet* presumption simply requires that, when there is doubt as to the proper interpretation of an ambiguous provision in a federal statute enacted for the benefit of an Indian tribe, "the doubt [will] benefit the Tribe, for '[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.' "'*Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 152 (1982) (quoting *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143-44 (1980)); *see also Native Vill. of Venetie I.R.A. Council v. Alaska,* 944 F.2d 548, 553 (9th Cir. 1991) (applying the *Blackfeet* presumption when choosing between two interpretations of the Indian Child Welfare Act of 1978). This presumption is subject to two implicit limitations. First, the presumption applies only to federal statutes that are "passed for the benefit of dependent Indian tribes." *Hoonah Indian Ass'n v. Morrison,* 170 F.3d 1223, 1228-29 (9th Cir. 1999) (internal quotation marks omitted). Second, ambiguity is a prerequisite for any application of the *Blackfeet* presumption. Thus, in *Rumsey,* we refused to apply the presumption favoring tribes where doing so would contradict the plain words of the statute. 64 F.3d at 1257.

Neither of those limitations prevents us from turning to the *Blackfeet* presumption in this case. As discussed above, the relevant text of the statute is ambiguous. Further, IGRA is undoubtedly a statute passed for the benefit of Indian tribes. IGRA's declaration of policy, providing that the statute is intended "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), firmly places the statute in the category of legislation to which the *Blackfeet*

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that the ADEA applies to Indian tribes. *Id.* But we reached the opposite conclusion, applying a doctrine unique to Indian law, under which a federal statute silent as to its applicability to Indian tribes will not be found to intrude on a tribe's right to self-governance in purely intramural affairs. *Id.*

presumption applies.

Application of the *Blackfeet* presumption is straightforward. We are confronted by an ambiguous provision in a federal statute that was intended to benefit Indian tribes. One construction of the provision favors Indian tribes, while the other does not. We faced a similar situation in the context of Indian taxation in *Quinault Indian Nation v. Grays Harbor County,* 310 F.3d 645 (9th Cir. 2002). In choosing between two characterizations of a tax law "plagued with ambiguity," we adopted the construction that favored the Indian Nation over the one that favored Grays Harbor County, noting that "it is not enough to be persuaded that the County's is a permissible or even the better reading." *Id.* at 647.

Here, we must follow a similar approach. We adopt Defendants' construction, not because it is necessarily the better reading, but because it favors Indian tribes and the statute at issue is both ambiguous and intended to benefit those tribes.

Neither of the two exceptions to the application of the *Blackfeet* presumption causes us pause. The first exception is that deference to an agency's interpretation can overcome the presumption in favor of Indian tribes. *Haynes v. United States,* 891 F.2d 235, 239 (9th Cir. 1989). *But see Navajo Nation,* 325 F.3d at 1136 n.4 (noting a circuit split as to whether deference to an agency's interpretation takes priority over the *Blackfeet* presumption). Assuming, without deciding, that the Secretary's interpretation of § 2710(d)(1)(B) is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), and *United States v. Mead Corp.,* 533 U.S. 218 (2001), that interpretation likewise adopts Defendants' construction of the statute and favors Indian tribes. In other words, the *Blackfeet* presumption and the doctrine of agency deference point to the same result.

The second exception involves the avoidance of constitutionally doubtful interpretations of a statute. In *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), we declined to adopt the Department of the Interior's interpretation of the Reindeer Industry Act of 1937, 25 U.S.C. §§ 500-500n. Although the agency's interpretation was "not unreasonable" and was owed *Chevron* deference, we ruled that the agency's interpretation raised severe constitutional concerns that prevailed over any deference owed to the agency. *Williams*, 115 F.3d at 661-62. We reasoned that, because *Chevron* deference trumps the *Blackfeet* presumption, and the Supreme Court held in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Trades Council*, 485 U.S. 568 (1988), that the doctrine of constitutional avoidance trumps *Chevron* deference, it follows that constitutional avoidance also trumps statutory constructions favoring Indians. *Williams*, 115 F.3d at 663 n.5.

**[9]** The doctrine of constitutional avoidance requires that " 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' " *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (quoting *DeBartolo Corp.*, 485 U.S. at 575 (emphasis omitted)). Here, we need not invalidate California's grant to Indian tribes of exclusive class III gambling privileges in order to save the statute from unconstitutionality because, as we are about to explain, Plaintiffs' constitutional arguments "do not carry the day." *Id.* at 191. Moreover, the privileges granted to Indian tribes do not raise constitutional concerns that are sufficiently "grave" to trigger the application of the doctrine. *Id.* Rather, the award of exclusive class III gaming franchises simply furthers the federal government's long-standing trust obligations to Indian tribes and helps promote their economic self-development. As the Supreme Court has cautioned elsewhere, "[s]tatutes should be interpreted to avoid *serious* constitutional doubts, not to eliminate all possible contentions that the statute *might* be unconstitutional." *Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993) (citation omitted). Thus, the doctrine of constitutional

avoidance does not apply here. *See Almendarez-Torres v. United States,* 523 U.S. 224, 239 (1998) (stating that "the 'constitutional doubt' doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious").

4. *Conclusion*

**[10]** IGRA is a statute that Congress enacted for the benefit of Indian tribes. Section 2710(d)(1)(B) remains ambiguous after consulting its text, context, purpose, and legislative history. We therefore apply the *Blackfeet* presumption and hold that California's Proposition 1A "permits" class III gaming within the meaning of IGRA by legalizing such gaming operations only when conducted by the "entity" of an Indian tribe.

B. *Equal Protection*

Having held that IGRA allows the State of California to grant to the Indian tribes a monopoly on class III gaming, we must decide the second question that Plaintiffs pose: whether that monopoly violates Plaintiffs' ' right to equal protection under the laws. The equal protection claim requires us to answer two questions. First, we must decide whether the distinction between Indian and non-Indian gaming interests is a political or a racial classification, so we can determine the proper level of deference that is owed to the classification. Second, we must decide whether, under the applicable standard of review, legitimate state interests justify the grant to Indian tribes of a monopoly on class III gaming.

1. *Nature of the Classification in IGRA and in Proposition 1A*

**[11]** "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor

infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Plaintiffs seek to avoid this deferential standard of review by arguing that the tribal monopoly on class III gaming amounts to a racial preference for Native Americans, which would be subject to strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). A racial preference violates equal protection guarantees unless it is "narrowly tailored" to "further compelling governmental interests." *Id.; see also Rice v. Cayetano*, 528 U.S. 495 (2000) (striking down a race-based voting limitation).

In the context of a challenge to legislative classifications relating to Indians or Indian tribes, the starting point for our analysis is *Morton v. Mancari*, 417 U.S. 535 (1974). In *Mancari*, the Supreme Court upheld an employment preference for Native Americans seeking positions in the Bureau of Indian Affairs ("BIA"). The class action plaintiffs, who were non-Indian applicants for BIA employment, argued that the preference amounted to invidious racial discrimination that violated their right to equal protection. The Supreme Court noted that, if credited, the plaintiffs' ' argument would call into question the entirety of Congress' regulation of Indian affairs under Article I, Section 8 of the U.S. Constitution:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

*Mancari*, 417 U.S. at 552-53.

The Court concluded that strict scrutiny did not apply because the preference for Indians relied on a political, rather than a racial, classification. The hiring preference was not directed toward "a 'racial' group consisting of 'Indians'; instead, it applie[d] only to members of 'federally recognized' tribes." *Id.* at 554 n.24. Thus, even if an applicant demonstrated the required quantum of Indian blood, he or she still would have to show membership in a federally recognized tribe in order to qualify for the hiring preference.

The Court tied its deferential standard of review to Congress' interest in furthering tribal sovereignty. The Indians who qualified for the preference were not racially defined, but rather were "members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554. The preference was also an important part of the Indian Reorganization Act of 1934. "The overriding purpose of that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Id.* at 542. The Court held that legislative classifications furthering that same purpose were political and, thus, did not warrant strict scrutiny instead of ordinary, rational-basis scrutiny: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process." *Id.* at 555.

Supreme Court cases decided shortly after *Mancari* emphasized the federal government's interest in tribal sovereignty and the unique relationship between tribal and federal governments. In *Fisher v. District Court*, 424 U.S. 382 (1976) (per curiam), the Court upheld the exclusive

jurisdiction of the Northern Cheyenne Tribal Court to handle adoptions, even though tribal litigants could not gain access to Montana's court system. Citing *Mancari,* the Court rejected the argument that denying tribal litigants access to the state-court system constituted racial discrimination:

> The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.

*Fisher,* 424 U.S. at 390-91 (citing *Mancari,* 417 U.S. at 551-55).

In *United States v. Antelope,* 430 U.S. 641 (1977), two Indian defendants argued that prosecuting them under a federal criminal law, for a crime committed on Indian lands, constituted racial discrimination because the federal law allowed a lower burden of proof than the corresponding state law. Exposing them to federal prosecution, they argued, violated their right to equal protection because a non-Indian who had committed the same crime would have been prosecuted under state law, not federal law. The Court rejected that argument, elaborating on its opinion in *Mancari:*

> [T]he principles reaffirmed in *Mancari* point . . . to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance

> of once-sovereign political communities; it is not to be viewed as legislation of a " 'racial' ' group consisting of 'Indians' . . . ."

*Antelope,* 430 U.S. at 645-46 (quoting *Mancari,* 417 U.S. at 553 n.24).

Although discussions of *Mancari* arise primarily in the con-text of federal statutes relating to Indian tribes, in *Washington v. Confederated Bands & Tribes of Yakima Indian Nation,* 439 U.S. 463 (1979) *("Yakima HI"),* the Supreme Court described the circumstances in which rational-basis review applies to Indian-related state laws. The Court applied rational-basis review to an equal protection challenge to a *state* law where *federal* legislation extended that law into Indian country. Washington had enacted a law, Chapter 36, 1963 Washington Laws, to assert partial civil and criminal jurisdiction over Indian lands pursuant to the grant of authority from Congress in Public Law No. 280. *Yakima III,* 439 U.S. at 501. Chapter 36 asserted such jurisdiction depending on the nature of the land (e.g., tribal or reservation) and the subject matter of the underlying law (e.g., compulsory school attendance and motor vehicle registration). *Id.* at 475-76. The Yakima Nation challenged the resulting "checkerboard" jurisdictional pattern, claiming that it lacked a rational foundation and therefore violated the Nation's right to equal protection. The Court sustained the classifications, applying rational-basis review:

> It is settled that "the unique legal status of Indian tribes under federal law" permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. States do not enjoy this same unique relationship with Indians, but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians. The jurisdiction permitted under Chapter 36 is, as

> we have found, within the scope of the authorization of Pub. L. 280. And many of the classifications made by Chapter 36 are also made by Pub. L. 280. . . . For these reasons, we find the argument that such classifications are "suspect" an untenable one. . . . In enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power.

*Id.* at 500-01 (citations omitted).

Thus, when a state law applies in Indian country as a result of the state's participation in a federal scheme that "readjusts" jurisdiction over Indians, that state law is reviewed as if it were federal law. If rationally related to both Congress' trust obligations to the Indians and legitimate state interests, the state law must be upheld.

Our early discussions of *Mancari* suggested that, so long as a federal statute evinced a rational relationship to Congress' trust obligations toward the Indians, it involved a political classification, so rational-basis review was appropriate. *See, e.g., Alaska Chapter, Associated Gen. Contractors of Am., Inc. v. Pierce,* 694 F.2d 1162, 1167 (9th Cir. 1982) (upholding a contracting preference for native Alaskan-owned businesses for construction contracts in Alaskan villages). More recently, however, we have suggested that the political-versus-racial classification is not always easy to identify. As we noted above, *Williams* rejected the Secretary's construction of the Reindeer Act. 115 F.3d at 664. Under the Secretary's interpretation, the Reindeer Act granted a preference to *individual* native Alaskans, who belonged to no tribal organization, that allowed them to engage in reindeer herding *anywhere* in Alaska, free from competition. So construed, the Act would not relate "to Indian land, tribal status, self-government or culture." *Id.* Consequently, rational-basis review would not apply and the statute most likely would constitute an

impermissible racial preference. We applied the canon of constitutional avoidance to reject the Secretary's interpretation. *Id.* at 663 & n.5.

Plaintiffs' suggestion that *Williams* controls the outcome of the present case ignores the obvious distinctions between an unqualified preference for individual native Alaskans and the limited preference for tribes reflected in the text of IGRA. The *operative terms* of IGRA expressly relate only to *tribes,* not to individual Indians. Only tribes, not individual Indians, may enter into compacts with other sovereign governments. Indeed, as in *Mancari* itself, only federally recognized tribes are covered. 25 U.S.C. § 2703(5). Further, through IGRA's compacting process, and through its reliance on tribal governments and tribal ordinances to regulate class III gaming, the statute relates to tribal status and tribal self-government. The very nature of a Tribal-State compact is political; it is an agreement between an Indian tribe, as one sovereign, and a state, as another. The statute contemplates that the tribes must exercise their sovereign will in deciding whether to participate in class III gaming. *See 25* U.S.C. § 2710(d)(1)(A) (providing for class III gaming only if authorized by a tribal ordinance or resolution).

Moreover, Congress' express *purpose* was to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The regulation of "gaming by an Indian tribe" also was intended to ensure that "the Indian tribe is the primary beneficiary of the gaming operation." *Id.* § 2702(2). In its findings, Congress recognized that Indian tribes had been conducting gaming activities on Indian lands as a means of generating revenue for tribal governments. *Id.* § 2701(1). Congress created the mechanism of Tribal-State compacts to resolve the conflicting interests of the tribes and the states, which it acknowledged as "two equal sovereigns." S. Rep. No. 100-446, at 13, *reprinted* at 3083.

Additionally, unlike the legislation construed in *Williams*, IGRA pertains only to *Indian lands*. 25 U.S.C. § 2710(d)(1). Like the vast majority of statutes by which Congress fulfills its obligations to the Indian tribes, IGRA regulates activities only on Indian lands. *See Williams*, 115 F.3d at 664 n.6 (collecting statutes). This limitation is critical given the well-established connection between tribal lands and tribal sovereignty. "Indian tribal territory has always held a separate status under federal law. Tribes exercise substantial governing powers within their territory, they have important economic and property rights, and a number of federal laws also govern other relationships, all to the exclusion of state law." Cohen at 27 (footnotes omitted). These governing powers and economic rights extend only as far as the borders of Indian lands. Once outside, the tribes shed their sovereignty and are fully amenable to state law. Under IGRA, for example, individual Indians (or even Indian tribes) could not establish a class III gaming establishment on non-Indian lands.[16]

Accordingly, IGRA falls squarely within the rule of *Mancari*. *Williams* continued to recognize that a statute relating to tribal self-government, to tribal status, or to Indian lands is subject to rational-basis review. 115 F.3d at 664. IGRA is just such a statute, notwithstanding the dictum in *Williams* that doubted whether Congress could give "Indians a complete monopoly on the casino industry." *Id.* at 665. As our lengthy discussion of the statute has made clear, IGRA does not give "Indians" a monopoly; it neither relates to "Indians" (as distinct from federally recognized tribes) nor, itself, creates a monopoly.

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[16] The present case concerns class III gaming operations that are located on Indian reservations or Indian trust lands. Thus, we need not and do not decide whether lands that are purchased specifically for the purpose of conducting class III gaming activities are "Indian lands" within the meaning of IGRA.

In arguing against rational-basis review, Plaintiffs also rely on cases applying federal law to tribe-run businesses to argue that tribal gaming operations do not involve uniquely Indian interests.[17] Their reliance is misplaced. The test used to determine whether rational-basis review applies to a federal statute's classification—which we have been discussing here— and the test used to determine whether tribes are immune from otherwise generally applicable federal laws are distinct, with the latter being much more demanding. *See Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113, 1116 (9th Cir. 1985) (listing the three exceptions to the principle that federal statutes that are silent on the issue of applicability to Indian tribes apply with equal force to Indians and non-Indians). Plaintiffs, in other words, conflate two distinct concepts.[18]

**[12]** We conclude, then, that IGRA pertains to Indian lands and to tribal self-government and tribal status of federally recognized tribes. Accordingly, under *Mancari,* rational-basis review applies.

**[13]** Turning next to Proposition 1A, we must apply *Yakima III.* Proposition 1A was enacted in response to IGRA, a federal law explicitly designed to readjust the regulatory authority of various sovereigns over class III

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[17] *See, e.g., Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.,* 154 F.3d 1117 (9th Cir. 1998) (holding that Title VII applies to the hiring practices of a tribe-run corporation); *Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174 (2d Cir. 1996) (holding that OSHA regulations apply to construction company owned and operated by an Indian tribe).

[18] "Plaintiffs' reliance on *Confederated Tribes of Siletz Indians v. Oregon,* 143 F.3d 481 (9th Cir. 1998), also is misplaced. Although we rejected the argument that Indian casinos "involve[d] only tribal members involved in on-reservation conduct," we did so in the context of determining that, as a matter of contract law, a state reporting statute applied to the tribe's gaming operations by virtue of the Tribal-State compact itself. *Id.* at 486-87.

gaming on the lands of federally recognized Indian tribes. The classifications in Proposition 1A echo those made in IGRA. In ratifying Proposition 1A, the people of California were legislating with reference to the authority that Congress had granted to the State of California in IGRA. Accordingly, rational-basis review applies to Proposition 1A as well. That Proposition 1A, unlike IGRA, expressly creates a tribal monopoly on class III gaming activities does not alter our conclusion. California's grant of a monopoly to the tribes is relevant to the merits, discussed below, but has no bearing on identifying the appropriate standard under which to review the state law.[19]

*2. Rational-Basis Review*

Having identified the level of deference that we owe to the legislation at issue, we turn to the merits of Plaintiffs' equal protection challenge.

*a. IGRA and the Tribal-State Compacts*

**[14]** IGRA is rationally related to Congress' stated purposes of encouraging tribal autonomy and economic development. We recognized, in *Alaska Chapter,* 694 F.2d at 1170, that the furtherance of "an economic community" on Indian lands was a goal related to Congress' special trust obligations. IGRA and the Tribal-State Compacts further that goal by authorizing gaming. Congress recognized that the revenue generated from pre-IGRA tribal gaming operations "often means the difference between an adequate governmental pro-gram and a skeletal program that is totally

[19] That Proposition 1A, unlike IGRA, expressly creates a tribal monopoly on class III gaming activities does not alter our conclusion. California's grant of a monopoly to the tribes is relevant to the merits, discussed below, but has no bearing on identifying the appropriate standard under which to review the state law.

dependent on Federal funding." S. Rep. No. 100-446, at 3, *reprinted* at 3072. Thus, IGRA and the Tribal-State Compacts also are rationally related to the federal government's interest in fostering tribal self-government.

*b. Proposition 1A*

Proposition 1A presents a more difficult question because it establishes the monopoly of which Plaintiffs principally complain. We conclude, nonetheless, that Proposition 1A passes the rational-basis test.

States have wide latitude in establishing classifications to balance interests and remedy perceived problems:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

*Beach Communications,* 508 U.S. at 316 (quoting *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 489 (1955)). Where there exists an appropriate connection to the state's police power, even the grant of a monopoly does not, in itself, offend equal protection principles. *See, e.g., City of New Orleans v. Dukes,* 427 U.S. 297, 300 (1976) (per curiam) (reversing an appellate court's holding that a "grandfather clause" exemption from a ban on pushcart vendors, which amounted to the "creation of a protected

monopoly for the favored class member," violated equal protection (internal quotation marks omitted)); *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 184 (1935) (holding that "the grant of a monopoly, if otherwise an appropriate exercise of the police power, is not void as denying equal protection of the law").

**[15]** California has two legitimate interests to which Proposition 1A bears a rational connection. The first is the regulation of "vice" activity—a function that lies at the heart of a state's police powers—by permitting certain forms of gambling only on the lands of sovereign tribal entities that enter into government-to-government compacts with the State. The second is to promote cooperative relationships between the tribes and the State by fostering tribal sovereignty and self-sufficiency.

*(i) Local Prohibitions and Exceptions for "Vice" Activities*

The circuits that have given significant attention to equal protection challenges to state gambling laws have, by and large, held that "the regulation of gambling lies at the heart of the state's police power." *Helton v. Hunt,* 330 F.3d 242, 246 (4th Cir.), *cert. denied,* 124 S. Ct. 436 (2003) (internal quotation marks omitted). In *Helton,* the court held that statutes providing for the destruction of certain gaming machines and the prosecution of their owners did not violate equal protection principles. *See also Casino Ventures v. Stewart,* 183 F.3d 307, 310 (4th Cir. 1999) (noting that, because gambling restrictions "are aimed at promoting the welfare, safety, and morals of South Carolinians, they represent a well-recognized exercise of state police power"); *United States v. Williams,* 124 F.3d 411, 423 (3d Cir. 1997) (upholding a Pennsylvania statute prohibiting certain gaming activities). Our own precedent, although not discussing the issue in great detail, is largely in accord. *See Jacobson v. Hannifin,* 627 F.2d 177, 180 (9th Cir. 1980) (upholding a Nevada law giving the state's gaming commission the power to deny licenses for gaming establishments "for any cause deemed reasonable by such commission").

Upholding a local advertising ban on casino gambling in Puerto Rico, the Supreme Court placed gambling in a category of "products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution," which state legislatures have dealt with by means ranging from location restrictions to outright prohibition. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.,* 478 U.S. 328, 346-47 (1986). A decade later, the Court disavowed *Posadas'* First Amendment holding but otherwise left its analysis of casino

gaming intact. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 511 (1996). In *Greater New Orleans Broadcasting Ass'n v. United States,* 527 U.S. 173 *(1999),* the Court held that 18 U.S.C. § 1304, which bans the broadcast of lottery and gambling advertisements in certain circumstances, could not be applied to ban broadcast advertisements for private casinos in states where such casinos are legal. The Court noted the availability of "practical and nonspeech-related forms of regulation," *including "location restrictions,"* to "alleviate some of the social cost of casino gambling." *Id.* at 192 (emphasis added).[20] Using the shorthand term "vice activity" to refer to these products and activities, the Court has rejected both First Amendment and equal protection challenges to legislative classifications aimed at reducing specific harms associated with vice activity. *United States v. Edge Broad. Co.,* 509 U.S. 418, 426 (1993). Such classifications have withstood scrutiny whether they distinguish between States, political subdivisions within a state, or establishments within the same locality.

In *Salsburg v. Maryland,* 346 U.S. 545 (1954), the Supreme Court upheld a Maryland statute that excepted only certain localities from the State's exclusionary rule of evidence. The exception applied only to " 'the use of such evidence in Anne Arundel, Wicomico and Prince George's

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[20] A decade later, the Court disavowed *Posadas'* First Amendment holding but otherwise left its analysis of casino gaming intact. *44 Liquorma Inc. v. Rhode Island,* 517 U.S. 484, 511 (1996). In *Greater New Orle Broadcasting Ass'n v. United States,* 527 U.S. 173 *(1999),* the Court held that 18 U.S.C. § 1304, which bans the broadcast of lottery and gambling advertisements in certain circumstances, could not be applied to ban broadcast advertisements for private casinos in states where such casinos are legal. The Court noted the availability of "practical and nonspeech-related forms of regulation," *including "location restrictions,"* to "alleviate some of the social cost of casino gambling." *Id.* at 192 (emphasis added).

Counties in the prosecution of any person for a violation of the gambling laws contained in [state statutes].' " *Id.* at 548 n.2 (quoting Md. Ann. Code of 1951, art. 35, § 5). Drawing from local-option laws regulating the sale of alcohol, *Salsburg* held that Mary-land

> could validly grant home rule to each of its 23 counties and to the City of Baltimore to determine this rule of evidence by local option. It is equally clear, although less usual, that a state legislature may itself determine such an issue for each of its local subdivisions, having in mind the needs and desires of each.

*Id.* at 552 & n.7 (footnote omitted). The Court held that the state had acted reasonably in singling out the counties excepted from the evidentiary rule because that selection was related to population concentration. Particularly in the field of criminal law, states have long-established discretion to enact distinctions of this kind. *See id.* at 553-54.

Local-option laws in the area of liquor control have shown particular resilience against equal protection challenges. Cases upholding such laws teach that a state constitutionally can allow a local subdivision to elect a more stringent regulatory approach or outright prohibition, or conversely can exempt a local subdivision from a state-wide ban on vice activity. Although the analysis has changed somewhat since *Rippey v. Texas,* 193 U.S. 504 (1904), and *Eberle v. Michigan,* 232 U.S. 700 (1914), the judicial trend still favors the validity of local-option laws as exercises of the state's police power. For example, the Seventh Circuit, in *Philly's, Inc. v. Byrne,* 732 F.2d 87 (7th Cir. 1984), upheld a local-option law allowing voters within a given Chicago city precinct to vote that precinct "dry." The court rejected a due process challenge by restaurant owners in Chicago who had lost their liquor licenses by popular vote. *Id.* at 90.

The Sixth Circuit followed a similar approach in rejecting an equal protection challenge to a local-option law. In *37712, Inc. v. Ohio Department of Liquor Control,* 113 F.3d 614, 621-22 (6th Cir. 1997), the court applied rational-basis review to uphold an Ohio statute allowing counties to go "dry" by local-option elections. It held that, so long as the police power is "not . . . abused to violate a person's federal constitutional rights," drawing distinctions between political subdivisions or allowing those subdivisions to distinguish themselves by an exercise of their own political will is permissible state action that survives rational-basis scrutiny. *Id.* at 618 (citing *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 515-16 (1996)).

The plaintiffs in *37712, Inc.,* were owners of bars and carry-out stores. They challenged the local-option law because the State of Ohio had issued licenses exempting certain breweries from the law. The plaintiffs asserted that their establishments were "similarly situated" to the breweries exempted from the ban and that the legislative distinction was therefore arbitrary. Rejecting their claim, the Sixth Circuit credited the legislative judgment that beer sales from the licensed establishments did not involve the same risks of disorderly conduct and crime posed by sales from the unlicensed establishments. *Id.* at 621. Although the safer course would be to ban all sales, the court noted that the " 'all or nothing' " approach was not the only one that would survive rational-basis review. *Id.* at 622.

The same analysis applies where states, or local voters, choose to exempt a political subdivision from state-wide prohibitions on vice activity. Quite recently, the Georgia Supreme Court upheld state statutes that give local governments the option of excepting certain businesses and venues from a state-wide ban on the sale of alcohol on Sunday. *State v. Heretic, Inc.,* 588 S.E.2d 224, 2003 WL 22281575 (Ga. Oct. 6, 2003). The plaintiffs, who were bar owners whose establishments did not qualify for the

exception, alleged that the discriminatory application of the exception amounted to a denial of equal protection.

Rejecting that challenge, the Georgia Supreme Court relied in part on *McGowan v. Maryland,* 366 U.S. 420 (1961). In that case the United States Supreme Court upheld a state-law exception of certain retail establishments in only one county from a state-wide ban on the sale of specified merchandise on Sunday. In addition to challenging the discriminatory treatment of different establishments in the same county, the plain-tiffs in *McGowan* challenged the statute because the exemption applied to only one county in the entire state. The Supreme Court rejected both arguments. As to the distinction between vendors, the Court held that, given the state's legitimate concerns, such as enforcement problems, the classification was reasonable. *Id.* at 428. As to the preferential treatment of vendors in Anne Arundel County, the Court held that "territorial uniformity is not a constitutional prerequisite" and that "the prescription of different substantive offenses in different counties is generally a matter for legislative discretion." *Id.* at 427.

In addition to relying on *McGowan,* the state court in *Here-tic* rested its decision on a distinction between vice activities and generic economic enterprises, rejecting the plaintiffs' argument that their claim was controlled by the court's prior holding that no rational basis supported a state law prohibiting furniture stores from operating on Sunday. The *Heretic* court was unpersuaded by an analogy between alcohol and furniture: "The present case is distinguishable because the state lacks the interest in regulating the sale of furniture that it has in regulating the sale of alcohol, which poses significant risks to the health and safety of the general public." 588 S.E.2d at ___, 2003 WL 22281575, at *2.

Similarly, we are unpersuaded by Plaintiffs' ' argument that allowing California to grant to tribes a monopoly on class III gaming operations, restricted to Indian lands,

necessarily will lead to Indian monopolies on other forms of economic activity. As a practical matter, Congress viewed gambling as a "unique form of economic enterprise" and was "strongly opposed to the application of the jurisdictional elections authorized by this bill to any other economic or regulatory issue that may arise between tribes and States in the future." S. Rep. No. 100-446, at 14, *reprinted* at 3084. As a constitutional matter, the state interests that justify, as a valid exercise of a state's police power, California's restriction of class III gaming operations to those conducted by Indian tribes on Indian lands are absent in the field of generic commercial activities. Most economic activities historically have not been deemed harmful. Thus, we do not believe that Plaintiffs' parade of horribles—tribal monopolies on automobile dealer-ships, for example—is a likely consequence of our conclusion that legitimate state interests support a restriction of casino-style gambling to Indian lands. Of course, in this case we need not and do not decide whether states constitutionally could grant tribes exclusive rights to conduct enterprises other than casino gambling.

Were the tribal lands a political subdivision of the State, California's exemption of tribal lands from its state-wide prohibition on class III gaming activities easily would withstand constitutional scrutiny. When enacting substantive regulations or prohibitions of vice activities, the interests implicated lie "at the heart of the state's police power." *Helton,* 330 F.3d at 246 (internal quotation marks omitted). With regard to these activities, a state is free to enact legislation that accords different treatment to different localities, and even to different establishments within the same locality, so long as that differentiation is tied to a legitimate interest in the health, safety, or welfare of its citizens. The state may make such distinctions by local-option laws, or by making the distinction between different areas itself. It may impose more stringent regulations by way of local restrictions, or it may exempt an area entirely from a state-wide ban on products and activities falling in the Supreme Court's "vice activity" category. Unless such

legislative distinctions infringe fundamental rights or involve suspect classifications, they generally survive equal protection analysis.

In the light of its stated concerns, California's exception of operations on tribal lands from its long-standing prohibition on class III gaming passes constitutional muster. Before Proposition 1A was ratified, California absolutely banned casino-style gaming. *See Hotel Employees,* 981 P.2d at 996 (tracing the history of California's gambling prohibitions back to 1849). Thus, its regulation of gambling does not involve the State's attaching a "vice" label to an activity without a corresponding prohibition. *See 44 Liquormart,* 517 U.S. at 514. California has expressed its legislative judgment that "[u]nregulated gambling enterprises are inimical to the public health, safety, welfare, and good order." Cal. Bus. & Prof. Code § 19801(c)(1). By limiting class III gaming to tribal lands, Proposition 1A, and the compacts negotiated pursuant to it, foster California's "legitimate sovereign interest in regulating the growth of Class III gaming activities in California." Tribal-State Compact, pmbl. F.

Further, limiting class III gaming operations to those run by tribes is reasonably designed to defend against the criminal infiltration of gaming operations. By restricting large-scale gambling enterprises to carefully limited locations, California furthers its purpose of ensuring that such gaming activities "are free from criminal and other undesirable elements." *Id.*

Thus, a rational basis exists for California's decision to restrict class III gaming operations to those conducted by Indian tribes on their own lands. California could, of course, pursue these interests even more effectively by banning class III gaming altogether. However, as discussed above, rational-basis review does not require states to choose an all-or-nothing approach. It requires only that the means chosen are reasonable.

(ii) *Indian Sovereignty*

The Indian tribes with whom the State of California has entered into compacts for class III gaming are sovereigns. By allowing Indian tribes to make their own decisions about the desirability of gaming operations on Indian lands, and by allowing Indian tribes to regulate those operations by tribal ordinance, the State of California sought "a mutually respectful government-to-government relationship that will serve the mutual interests of [the tribes and the State]." Tribal-State Compact § 1.0(a).

The selective application of state law to Indian lands is not unprecedented. In *Yakima III,* the Supreme Court expressly approved of jurisdictional schemes that balance a state's interest in protecting its citizens with a tribe's interest in exercising sovereignty over its lands:

> The land-tenure classification made by the State is neither an irrational nor arbitrary means of identifying those areas within a reservation in which tribal members have the greatest interest in being free of state police power. Indeed, many of the rules developed in this Court's decisions in cases accommodating the sovereign rights of the tribes with those of the States are strikingly similar. In short, checker-board jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution.

439 U.S. at 502.

**[16]** Like Public Law No. 280, IGRA's jurisdictional framework gives the State of California a role in identifying those areas where Indian tribes have a substantial interest in being free of state police power. It is rational for Californians to be willing to recognize the separate sovereign interests of the tribes and to allow the tribes to make a different moral

and economic choice than is made by the State as a whole. By executing the Tribal-State Compacts, California has sought to bring about a "new era of tribal-state cooperation in areas of mutual concern." Tribal-State Compact, pmbl. D. California's decision to grant to tribes a monopoly on class III gaming activities is rationally related to both the State's interest in protecting its citizens from the particular harms associated with large-scale gaming operations *and* the State's interest in fostering relations with tribes as separate sovereigns.

**[17]** In addition, the compacts that California has negotiated with the tribes are designed to further the purposes of IGRA, which include "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). By providing exclusive rights to engage in class III gaming, California gives Indian tribes valuable tools to promote the general welfare of their members. Class III gaming helps generate jobs and revenues to support the governmental services and programs of the tribes that enter into compacts. Further, California's regulatory scheme benefits nongaming tribes because they receive distributions from the funds that the State requires gaming tribes to allocate to the Indian Gaming Revenue Sharing Trust. "This mechanism is intended to ensure that the wealth generated by gambling is not just limited to tribes who have entered into compacts, but will be redistributed for the benefit of all tribes in California." *Flynt,* 129 Cal. Rptr. 2d at 183. Thus, we agree with the district court's finding that "California's compacts with the tribes are rationally related to the furtherance of Congress' unique obligation to the tribes." *Artichoke Joe's,* 216 F. Supp. 2d at 1129.

**[18]** In summary, Congress acted rationally in balancing the sovereign interests of tribes and states. The State of California, which historically had banned casino gambling altogether, acted rationally in limiting the placement and concentration of class III gaming operations to Indian lands

and in recognizing the sovereign interest of federally recognized Indian tribes to choose a different path on Indian lands. Accordingly, we find no violation of equal protection.

## CONCLUSION

We hold that IGRA, Proposition 1A, and the Tribal-State Compacts are consistent with IGRA. We also hold that Proposition 1A and the Tribal-State Compacts do not violate Plaintiffs' rights to equal protection of the laws.

Accordingly, the judgment of the district court in favor of Defendants is

AFFIRMED.

United States District Court,
E.D. California.

ARTICHOKE JOE'S, California Grand Casino, Fairfield Youth Foundation, Lucky Chances, Inc., Oaks Club Room, Sacramento Consolidated Charities, Plaintiffs,

v.

Gale A. NORTON, James McDivitt, Gray Davis, Bill Lockyer, Harlan W. Goodson, John E. Hensley, Michael C. Palmer, J.K. Sasaki, Arlo Smith, Defendants.

No. CIV.S-01-248-DFL-GGH

Aug. 5, 2002

# AMENDED MEMORANDUM OF OPINION AND ORDER

Plaintiffs challenge the validity of compacts entered into under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, between the State of California and certain Indian tribes. The compacts permit the tribes to offer Las Vegas style high stakes gaming, including slot machines. The compacts were specifically authorized by a California constitutional amendment, Proposition 1A, which gives the Governor the authority "to negotiate and conclude compacts ... for the operation of slot machines and for the conduct of lottery games and banking card games by federally recognized Indian tribes on Indian lands in California." Cal. Const. Art. IV, sec. 19(e). The plaintiffs are California card clubs and charities who are prohibited under state law from offering similar sorts of gambling, and thus have been placed at a competitive disadvantage. Plaintiffs allege that the defendants, various state and federal officers, including the Governor and the Secretary of the Interior, violated IGRA and the Fifth and Fourteenth Amendments to the United States Constitution by creating a tribal monopoly on Las

Vegas style gaming. Plaintiffs seek both declaratory and injunctive relief to invalidate the existing compacts and to block the execution of any future compacts. The state and federal defendants contend that the court lacks jurisdiction to hear the plaintiffs' claims and that neither Proposition 1A nor the compacts violate federal law. On cross-motions for summary judgment, the court finds that it has jurisdiction over most of the plaintiffs' claims and further finds that neither the compacts nor Proposition 1A violate federal law.

Because of the opinion's length and the wide range of issues addressed, the court provides the following summary. On the standing issues, the court has jurisdiction to resolve the claims against the federal defendants, the claims against the Governor related to existing compacts, and the claims against the State Attorney General and the Director of the California Division of Gambling Control as to the enforcement of state gaming laws against plaintiffs. The court concludes that as to count II, brought against the state defendants as to existing and future compacts, plaintiffs have demonstrated an injury in fact with respect to the Governor and the existing compacts. However, they fail to demonstrate an immediate and imminent threat of harm from possible future compacts, and thus, are not entitled to seek equitable relief as to any future compacts, including potential compacts involving the Lytton Rancheria under count III. Also as to count II, the plaintiffs have established that the Governor's conduct caused their alleged injuries and that a favorable ruling would redress their alleged harms. Further, they have established causation and redressability as to the Attorney General and the Director, but not the Commission, under count IV which seeks to enjoin enforcement of California Penal Code provisions prohibiting plaintiffs and others from engaging in Las Vegas style gambling. The court further concludes that it has jurisdiction over the Governor, Attorney General, and the Director under *Ex parte*

*Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

As to count I, which is brought against the federal defendants, the court concludes that plaintiffs may bring a claim to enforce IGRA and the Johnson Act under § 701(a)(1) of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* Further, because matters related to the approval of tribal gaming compacts are not committed by law to agency discretion, plaintiffs' claims are not precluded by § 701(a)(2) of the APA. The court also concludes that the plaintiffs fall within the zone of interests arguably sought to be protected by IGRA and the Johnson Act. Finally, because the legal interests of California's Indian tribes are adequately represented by the Secretary of the Interior, the tribes are not necessary and indispensable parties under Fed.R.Civ.P. 19.

With respect to the merits of the case, the court holds that the class III gaming compacts are valid under IGRA and the Constitution. Because California law through Proposition 1A permits class III gaming for Indian tribes with compacts, it satisfies IGRA's requirement that the state "permit" class III gaming "for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). The court finds that this statutory language cannot reasonably be understood to condition class III Indian gaming on the state's permission of class III gaming to all persons for any purpose. If this were the proper interpretation, IGRA would be a virtual nullity because no state would ever grant class III gaming privileges to all comers for any purpose. Rather, the language is best understood to open the way to class III Indian gaming if the state grants permission to any one group or person, including Indian tribes. For these reasons, the court concludes that the defendants are in compliance with IGRA and the Johnson Act.

The court further finds that the tribal class III gaming

monopoly does not discriminate on the basis of race. Under well established Supreme Court precedent, "[f]ederal regulation of Indian tribes ... is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians' ...." *United States v. Antelope,* 430 U.S. 641, 646, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977) (quoting *Morton v. Mancari,* 417 U.S. 535, 553 n. 24, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974)). So long as the compacts are rationally related to Congress' trust obligation to the tribes, the compacts will not be set aside on constitutional grounds. Because the compacts, including the monopoly on class III gaming, promote tribal economic development, they are rationally related to Congress' trust obligations and do not violate equal protection.

This case presents significant, complex legal issues against a background of even more important and complex policy questions. Those policy questions must be resolved by the political branches and the electorate. The court decides only that the state and federal defendants did not violate federal law by entering into the compacts at issue.

## I. Facts and Procedural History

### A. *Indian Gaming Regulatory Act*

The Indian Gaming Regulatory Act was enacted by Congress in 1988 shortly after the Supreme Court's decision in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). In *Cabazon* the Court invalidated California's regulation of Indian bingo on the ground that such regulation was civil rather than criminal in nature and therefore was not authorized by Public Law 280.[21] As a practical result of *Cabazon,* Indian tribes were

[21] Public Law 280 permits certain states, including California, to

free to offer gaming on tribal lands subject only to federal regulation or to state criminal prohibitions. Although Congress had been considering bills to regulate Indian gaming for several years, *Cabazon* left something of a regulatory vacuum that made the issue of Indian gaming regulation more pressing.[22]

IGRA was Congress' compromise solution to the difficult questions involving Indian gaming. The Act was passed in order to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "to shield [tribal gaming] from organized crime and other corrupting influences to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(1), (2). IGRA is an example of "cooperative federalism" in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme. *See New York v. United States,* 505

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exercise criminal jurisdiction over Indian lands. Public Law 280 provides in relevant part:

> Each of the States ... listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed ... to the same extent that such State ... has jurisdiction over offenses committed elsewhere within the State ..., and the criminal laws of such State ... shall have the same force and effect within such Indian country as they have elsewhere within the State.

18 U.S.C. § 1162(a).

[22] The first bills to regulate Indian gaming were introduced in the 98th Congress, H.R. 4566 and H.R. 6390. Five bills were subsequently introduced in the 99th Congress, H.R.1920, H.R. 3752, H.R. 2404, S. 2557, and S. 902. In the 100th Congress, S. 555 was introduced shortly before the Court's decision in *Cabazon*, and was followed by S. 1303 and S. 1841, in the Senate, and in the House, by H.R. 1079, H.R. 964, H.R. 2507, and H.R. 3605.

U.S. 144, 167-68, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (collecting examples of cooperative federalism).

IGRA functions by dividing gaming into three categories and intensifying the level of regulatory oversight depending on the category of gaming. "Class I gaming" includes social games with prizes of minimal value, as well as traditional forms of Indian gaming, and is subject to exclusive regulation by Indian tribes. 25 U.S.C. §§ 2703(6), 2710(d). "Class II gaming" includes bingo and card games explicitly authorized by the State, or not explicitly prohibited by the State if such games are actually played in the State, but does not include any banking card games or slot machines.[23] *Id.* § 2703(7)(A). Class II gaming is subject to joint regulation by the federal government and tribal authorities. *Id.* § 2710(d).

Class III gaming is defined as all forms of gaming that "are not class I gaming or class II gaming." *Id.* § 2703(8). Class III gaming includes parimutuel horse race wagering, lotteries, banking card games, slot machines, and all games with non-Indian origins.[24] Class III gaming is only lawful on Indian lands if three conditions are met:[25] (1) approval by

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[23] In banked or percentage card games, players bet against the "house" or the casino. In "nonbanked" or "nonpercentage" card games, the "house" has no monetary stake in the game itself, and players bet against one another. (Eadington Decl. at ¶ 131). Banked or percentage card games include the types of gaming generally associated with Atlantic City or Las Vegas.

[24] Slot machines were developed in the late 19th century and had their origins in saloons. (*Id.* at ¶ 54). Blackjack was derived from French and Italian card games. (*Id.* at ¶ 55).

[25] The statute provides that class III Indian gaming must be:

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman [of the National Indian

the governing body of the Tribe and the Chairman of the National Indian Gaming Commission ("NIGC"); (2) permission by the state, in the sense that the state permits "such gaming," "for any purpose by any person"; and (3) existence of a Tribal-State compact that is approved by the Secretary of the Interior.[26]

The Tribal-State compact is the key to class III gaming under IGRA. Under such a compact, the federal government cedes its primary regulatory oversight role over class III Indian gaming, and permits states and Indian tribes to develop joint regulatory schemes through the compacting process.[27] In this way, the state may gain the civil regulatory

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Gaming Commission],

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

25 U.S.C. § 2710(d)(1).

[26] The Secretary of the Interior has 45 days to approve or disapprove a compact, or the compact is deemed approved "to the extent the compact is consistent with [IGRA]." *Id.* § 2710(8)(D). The Secretary may disapprove a compact if it violates IGRA, any other provision of federal law, or "the trust obligations of the United States to Indians." *Id.* § 2710(8)(B).

[27] IGRA also added 18 U.S.C. § 1166 which states that "for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." Section 1166(d) gives the United States "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act ... has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe." 18 U.S.C. § 1166(d).

authority that it otherwise lacks, and a tribe gains the ability to offer class III gaming.[28] *See Keweenaw Bay Indian Community v. United States,* 136 F.3d 469, 472 (6th Cir.1998). IGRA provides that the Tribal-State compact may include provisions relating to a number of issues that arise once class III gaming begins, including the application of state criminal and civil laws, the allocation of jurisdiction between the state and the tribe necessary for the enforcement of gaming laws, and the assessment by the State of gaming activities in order to defray the costs of regulation.[29]

The compacting process begins when a tribe requests negotiations with the state in which its lands are located. *Id.* § 2710(3)(A). IGRA provides jurisdiction in the federal courts to hear a claim by a tribe that a state has failed to negotiate in "good faith."[30] *Id.* § 2710(d)(7)(A). If a court finds that a state failed to negotiate in good faith, IGRA permits the court to order the state and the tribe to conclude a compact within 60 days. *Id.* § 2710(d)(7)(B)(iii). If the

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[28] Separately, IGRA includes a waiver of the Johnson Act, 15 U.S.C. § 1175(a), which prohibits the use of gambling devices, including slot machines, within Indian country. IGRA's waiver provision states that the Johnson Act "shall not apply to any gaming conducted under a Tribal-State compact that-

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect."

25 U.S.C. § 2710(d)(6).

[29] Except for these assessments, states may not otherwise impose "any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." *Id.* § 2710(4).

[30] Although the Court invalidated this provision of IGRA in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), on the ground that it violated the Eleventh Amendment and state sovereign immunity, the State of California has consented to such suits by waiving its immunity. Cal. Gov't Code § 98005.

parties are unable to agree to a compact within this period of time, IGRA directs the parties to submit their "last best offer for a compact" to a mediator who will then select the more appropriate plan. *Id.* § 2710(d)(7)(B)(iv). In determining whether a state negotiated in good faith, IGRA permits courts to "take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities." *Id.* § 2710(d)(7)(B)(iii)(II).[31]

Finally, IGRA explicitly prohibits gaming on lands taken into trust for the benefit of a tribe after October 17, 1988. *Id.* § 2719(a). This restriction does not apply, however, if the Secretary, having consulted with tribal and state and local officials, and having secured the agreement of the Governor, determines that gaming on the newly acquired lands would benefit the tribe and would not be detrimental to the surrounding community.[32] *Id.* § 2719(b).

B. *California Gaming*

Following the enactment of IGRA, the State of California and various Indian tribes in California attempted to conclude Tribal-State compacts. However, the State and the tribes

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[31] IGRA also permits federal courts to consider "any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith." 25 U.S.C. § 2710(d)(7)(B)(iii)(II).

[32] Section 2719(b) also states that the restriction on gaming on lands acquired after October 17, 1988 does not apply when:

> (B) lands are taken into trust as part of--
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> (i) a settlement of a land claim,
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> (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or
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> (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

*Id.* § 2719(b)(1).

disagreed about the forms of gaming that would be permitted and the content of the compacts. *See, e.g., Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250 (9th Cir.1994); *Hotel Employees and Rest. Employees Int'l Union v. Davis,* 21 Cal.4th 585, 88 Cal.Rptr.2d 56, 981 P.2d 990 (1999). These disagreements were ultimately settled, and on September 10, 1999, Governor Davis approved fifty-seven class III gaming compacts on behalf of the State of California. (Complaint at ¶ 39). The compacts, which are effective until December 31, 2020,[33] are identical in most respects. The compacts point to the preferred position accorded to the tribes, noting that the compacts "create a unique opportunity for [each] Tribe to operate its Gaming Facility in an economic environment free of competition from the Class III gaming ... on non-Indian lands in California." (Tribal-State Compact Between the State of California and the Augustine Band of Mission Indians ("Compact"), at 2, § 11.2.1(a), Exh. 1 to St. Defs.' App. of Authorities).

The compacts permit each signatory tribe to operate "gaming devices" or slot machines, banking or percentage card games, and any devices or games that the California State Lottery is authorized to offer. *Id.* at § 4.1. The tribe may initially operate up to 350 slot machines, but, by participating in a series of draws, a tribe may acquire licenses to operate up to 2,000 slot machines. *Id.* at §§ 4.3.1, 4.3.2.2. The tribe must, however, pay a one-time non-refundable fee of $1,250 for each gaming device it operates that goes into a "Revenue Sharing Trust Fund," which distributes up to $1.1 million per year to tribes without compacts. *Id.* at § § 4.3.2.1, 4.3.2.2(3).[34]

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[33] The compacts permit a signatory tribe to terminate a compact "in the event the exclusive right of Indian tribes to operate Gaming Devices in California is abrogated." (Compact at § 12.4).

[34] Tribes with compacts must also make yearly payments into the Fund

Two agencies, the "Tribal Gaming Agency" and the "State Gaming Agency," are responsible for the bulk of regulatory oversight under the compacts. The Tribal Gaming Agency is defined as the regulatory agency designated to carry out the signatory Tribe's regulatory responsibilities, and it has primary responsibility for the on-site regulation of Indian gaming.[35] *Id.* at §§ 2.20, 7.0. The State Gaming Agency, defined as the "entities authorized to investigate, approve, and regulate gaming licenses" under Cal. Bus. & Profs. Code § 19800 *et seq.*, includes the California Gambling Control Commission and the Division of Gambling Control in the California Department of Justice.[36] *Id.* at § 2.18; Cal. Bus. & Profs. Code § § 19809, 19810A. Members of the Commission are appointed by the Governor, subject to confirmation by the State Senate, and serve four year terms. Cal. Bus. & Profs. Code § 19812A.

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according to a graduated formula that increases the amount that each tribe must contribute annually per device up to $4350. *Id.* at § 4.3.2.2(2). Separately, the compacts create a "Special Distribution Fund" comprised of payments made by tribes of between 0% and 13% of the gaming device winnings. *Id.* at § 5.1. Revenue deposited into the Special Distribution Fund is available for appropriation by the Legislature for prescribed purposes including payments to state agencies for expenses related to Indian gaming.

[35] The compacts state that the

> "Tribal Gaming Agency" means the person, agency, board, committee, commission, or council designated under tribal law ... to fulfill those functions by the National Indian Gaming Commission, as primarily responsible for carrying out the Tribe's regulatory responsibilities under IGRA and the Tribal Gaming Ordinance. No person employed in, or in connection with the management, supervision, or conduct of any gaming activity may be a member or employee of the Tribal Gaming Agency.

Compact at § 2.20.

[36] The California Gambling Control Commission also administers the Revenue Sharing Trust Fund. (Compact at ¶ 4.3.1(a)(ii)).

As part of its regulatory function, the Tribal Gaming Agency may promulgate rules and regulations governing the management and operation of tribal gaming facilities, although its regulations must be consistent with the State Gaming Agency's statewide rules. Compact at §§ 8.1, 8.4. In certain circumstances, the State Gaming Agency may also promulgate rules directly applicable to Indian gaming facilities. *Id.* at § 8.4.1.

As part of its regulatory oversight, the Tribal Gaming Agency licenses all Indian gaming facilities and all persons who work in and with them. *Id.* at § 6.4.1. However, subject to a variety of exceptions, a person who has been denied a determination of suitability by the State Gaming Agency may not work in or with a gaming facility. *Id.* at §§ 6.4.4(c), 6.4.5. Further, except for "non-key Gaming Employee[s]," the Tribal Gaming Agency must require license applicants to file an application with the State Gaming Agency for a determination of suitability for licensure under the California Gambling Control Act. *Id.* at § 6.5.6. The Tribal Gaming Agency is also charged with inspecting class III gaming facilities to determine if they are in compliance with IGRA, the governing compact, and the Agency's regulations, although the State Gaming Agency may also conduct inspections of its own. *Id.* at § 7.0.

Finally, the compacts specify three conditions that must be met before they become effective. The compacts must be ratified by the State Legislature and be approved by the United States Secretary of the Interior ("Secretary"). Also, because California prohibits class III gaming under Cal. Cons. Art. IV, sec. 19(e), and Cal.Penal Code §§ 330, 330a, 330b, California voters must approve the California Senate's proposed Constitutional Amendment 11 ("Proposition 1A"), that would permit the Governor to enter into class III gaming

compacts, thereby exempting Indian tribes from the general prohibition on gaming. *Id.* at § 11.1.

All three conditions have been satisfied. In September 1999, the California Legislature ratified the fifty-seven compacts that were signed by the Governor on September 10, 1999, and enacted provisions to expedite the approval of additional identical compacts.[37] Cal. Gov't Code § 12012.25. On March 7, 2000, California voters approved Proposition 1A which amended the California Constitution as follows:

> Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law.

Cal. Const. Art. IV, sec. 19(e). On May 5, 2000, the Assistant Secretary of Indian Affairs, approved the compacts

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[37] California Gov't Code § 12012.25 provides:

(b) Any other tribal-state gaming compact entered into between the State of California and a federally recognized Indian tribe which is executed after September 10, 1999, is hereby ratified if both of the following are true:

(1) The compact is identical in all material respects to any of the compacts expressly ratified pursuant to subdivision (a). A compact shall be deemed to be materially identified to a compact ratified pursuant to subdivision (a) if the Governor certifies it is materially identical at the time he or she submits it to the Legislature. (2) The compact is not rejected by each house of the Legislature, two- thirds of the membership thereof concurring, within 30 days of the date of the submission of the compact to the Legislature by the Governor. However, if the 30-day period ends during a joint recess of the Legislature, the period shall be extended until the fifteenth day following the day on which the Legislature reconvenes.

on behalf of the Secretary of the Interior, expressly finding that "[t]he Governor can, consistent with the State's amended Constitution, conclude a compact giving an Indian tribe, along with other California Indian tribes, the exclusive right to conduct certain types of Class III gaming." (Letter from Kevin Gover, May 5, 2000, Exh. B to Complaint). The Secretary's approval was published in the Federal Register on May 16, 2000. (Notice of approved Tribal-State Compacts, 65 Fed.Reg. 31,189 (May 16, 2000)).

Since the first 57 compacts became effective, five additional compacts have been entered into by the Governor and approved by the Secretary. (Notice of approved Tribal-State Compact, 65 Fed.Reg. 41721 (July 6, 2000); Notice of approved Tribal-State Compact, 65 Fed.Reg. 62749 (October 19, 2000); Pls.' Resp. to State Defs.' Statement of Undisputed Facts ("SUF") at ¶ 15). Further, at least two additional tribes have requested class III gaming compacts, but their requests have been placed on hold by the State until the conclusion of this lawsuit. (*See* Shelley Anne Chang Letters, May 2, 14, 2001, Exhs. K, L to Pls.' Reply). Thirty-nine of the 62 tribes with compacts currently operate casinos with slot machines, 18 of which are located in Northern California. Some 44 California tribes remain without compacts. (Eadington Decl. at ¶¶ 3, 4).[38]

C. *The Lytton Band*

On March 22, 1991, the Lytton Rancheria, a tribe previously terminated by the federal government under Pub.L. 85-671, 72 Stat. 619, was reinstated according to the terms of a stipulation entered into between the Tribe, the United States, and the County of Sonoma where the Tribe's

[38] The state defendants' objections to evidence, including to the Eadington declaration, are denied.

lands historically were located. (*Indians of the Sugar Bowl Rancheria, et al. v. United States,* No. C-86-3660 (N.D.Cal. Mar. 22, 1991) (Stipulation for Entry of Judgment), Exh. G to State Defs.' Motion to Dismiss; Notice of Reinstatement, 57 Fed.Reg. 5214-01 (Feb. 12, 1992)). The stipulation included provisions which permitted the Secretary of the Interior to take land into trust for the then landless Rancheria in the Alexander Valley in Sonoma County. (*Id.* at ¶ 5).

Following the Lytton Rancheria's reinstatement, the Tribe acquired land in San Pablo in Contra Costa County, less than 20 miles from downtown San Francisco. (Eadington Decl. at ¶ 6). Although the Rancheria has not yet requested negotiations to conclude a gaming compact with respect to this land, (Pls.' Resp. to State Defs.' SUF at ¶ 24), in September, 1999, it entered into a Municipal Services Agreement with the City of San Pablo stating that the Rancheria "intends to enter into a compact with the State of California ("State") which provides for the joint exercise of jurisdiction of the Band and the State to regulate gaming on the Property pursuant to the IGRA." (Municipal Services Agreement at 2, Exh. J to Pls.' Exhs. to Motion).

However, because the San Pablo land was not acquired until 1999, it fell under 25 U.S.C. § 2719's restriction on class III gaming on lands acquired after October 17, 1988, and the Lytton Tribe could not offer gaming on the San Pablo tract unless it satisfied one of the exceptions enumerated in § 2719(b). On December 27, 2000, the Omnibus Indian Advancement Act of 2000, Pub.L. 106-568, Stat. 2868, went into effect. (Complaint at ¶ 52). Section 819 of the Act ("San Pablo Legislation"), which was passed without hearings or debate, (Pls.' SUF at ¶ 18; Complaint at ¶ 53), effectively "backdated" acquisition of the Lytton Rancheria's land in San Pablo prior to October 17, 1988.[39]

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[39] Section 819 provides:

Thus, if the Lytton Rancheria seeks to conclude a class III gaming compact covering its land in San Pablo, the San Pablo Legislation apparently exempts it from the consultation requirements in § 2719.

D. *Plaintiffs' Allegations*

This complaint was filed on February 7, 2001. The plaintiffs in this case consist of four card clubs and two charities that offer class II gaming in Northern California and that are prohibited by the California Penal Code from offering any form of class III gaming including banking card games and slot machines.[40] Plaintiffs attack the monopoly on class III gaming accorded by the compacts and allege that

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> Notwithstanding any other provision of law, the Secretary of the Interior shall accept for the benefit of the Lytton Rancheria of California the land described in that ... grant deed dated ... October 16, 2000 .... The Secretary shall declare that such land is held in trust by the United States for the benefit of the Rancheria .... Such land shall be deemed to have been held in trust and part of the reservation of the Rancheria prior to October 17, 1988.

Pub.L. 106-568, Stat. 2868.

[40] Plaintiffs are Artichoke Joe's in San Bruno, California; California Grand Casino in Pacheco, California; Lucky Chances in Colma, California; and Oaks Club Room in Emeryville, California. (Complaint at ¶¶ 15-18). Customers at these establishments "play various card games in which participants wager against each other and pay the operator a fee for the use of the facility." *Id.* Plaintiffs Fairfield Youth Foundation and Sacramento Consolidated Charities are non-profit corporations located in Fairfield and Sacramento, respectively. *Id.* at ¶ 19. Both organizations operate bingo games to raise money for charitable organizations. *Id.* at ¶ 20. Each plaintiff submitted a declaration stating that it would like to offer class III gaming and that it has facilities for doing so. Sammut Decl. at ¶ 11 (Artichoke Joe's); Medina Decl. at ¶ 7 (Lucky Chances); Wilkinson Decl. at ¶¶ 3-4 (California Grand); Taylor Decl. at ¶ 4 (Fairfield Youth Foundation); Beers Decl. at ¶ 3 (Sacramento Consolidated Charities); and Tibbit Aff. at ¶¶ 4-5 (Oaks Club Room).

various state and federal officers violated IGRA and the Fifth and Fourteenth Amendments by entering into, approving, and administering the compacts. The named federal defendants are Gale Norton, Secretary of the Interior, and James McDivitt, Acting Assistant Secretary of the Interior for Indian Affairs ("federal defendants").[41] The named state defendants are Gray Davis, Governor of the State of California; Harlan W. Goodson, Director of the California Division of Gambling Control; John E. Hensley, Chair of the California Gambling Control Commission; Michael C. Palmer, J.K. Sasaki, and Arlo Smith, members of the California Gambling Control Commission; and Bill Lockyer, Attorney General of the State of California ("state defendants"). *Id.* at ¶¶ 21-26.

Plaintiffs argue that the state's prohibition on class III gaming keeps them from competing for part of a significant market--tribal gaming in California may generate up to $4.7 billion per year by 2004. (Eadington Decl. at ¶ 8). According to plaintiffs, the class II gaming they are permitted to offer cannot compete with the Las Vegas style gaming offered by the tribes. (*Id.* at ¶ 19). Banking and percentage card games offer gamblers the chance to win more money and are more profitable for class III operators because the operator can take a stake in the action. (*Id.* at ¶ 20). And because of their stake in the activity, class III operators do not need to charge players by the hand or the hour the way that class II operators do. Slot machines also contribute to the popularity of class III gaming casinos. In most casinos, slot machines account for "in excess of 70% of

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[41] Gale Norton became Secretary of the Interior on January 31, 2001. The compacts at issue were approved by her predecessor, Bruce Babbitt. Because Secretary Norton does not suggest that there has been any change in agency policy and for ease of expression, all actions by Secretary Babbitt are treated as actions by Secretary Norton throughout this opinion.

total gaming winnings," and depending on location, competition, and how they are regulated, each machine may generate between $88 and $440 per day. (*Id.* at ¶¶ 10, 18). As of January 25, 2001, there were over 25,000 slot machines in use on Indian lands in California. (*Id.* at ¶ 11).

Plaintiffs argue that "[m]any customers who presently patronize California cardrooms and charity bingo games are likely to be attracted by the greater variety of games, and the greater payoffs, offered at casinos conducting class III gaming, particularly those that offer slot machines," an effect documented in other states that have introduced tribal gaming. (Complaint at ¶ 29; Eadington Decl. at ¶¶ 25-29 (noting effect of class III Indian gaming in Arizona, Michigan, and New Orleans)). Plaintiffs are especially concerned that a tribe will be permitted to offer class III gaming in an urban area putting class III gaming casinos in closer proximity to the plaintiffs' establishments. (Complaint at ¶ 8).

Plaintiffs' complaint contains four counts. In count I, plaintiffs allege that the federal defendants' approval of the compacts violated the APA, because the compacts, and hence the approvals, violate IGRA, the Johnson Act, and the Fifth Amendment to the United States Constitution. (Complaint at ¶ 75). Plaintiffs essentially make two arguments; they argue that extending a class III gaming monopoly to Indian tribes (1) violates IGRA's "any person, organization, or entity" requirement, 25 U.S.C. § 2710(d), and (2) constitutes illegal discrimination on the basis of race and violates the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments.

The remaining three counts are all directed against the state defendants and are brought under 42 U.S.C. § 1983. Count II, brought against the Governor, the Director of the

California Division of Gambling Control ("Director"), and the Chair and members of the California Gambling Control Commission ("Commission"), alleges that Proposition 1A and the compacts violate IGRA, the Johnson Act, and the Equal Protection Clause of the Fourteenth Amendment. (*Id.* at ¶ 78). In count III, which is directed at the Governor alone, plaintiffs allege that the San Pablo legislation violates IGRA and the Johnson Act, and is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. (*Id.* at ¶ 82-83).

Count IV, brought against the Attorney General, the Director, and the Commission, seeks to preclude enforcement of Cal.Penal Code §§ 330, 330a, 330b which prohibit class III gaming in California. Plaintiffs allege that continued enforcement of these laws, when tribal gaming is exempted, constitutes illegal discrimination on the basis of race or ethnic origin.

Plaintiffs seek declaratory and injunctive relief on all counts. Specifically, plaintiffs seek a judgment to set aside the federal defendants' approval of the compacts and a declaration that such approvals violate IGRA, the Johnson Act, the APA, the Fifth Amendment, and aid and abet the state defendants' violation of the Fourteenth Amendment. (*Id.* at 31). The plaintiffs also seek (1) with respect to the Governor, Director, and Commission, a declaration that Proposition 1A and the compacts violate IGRA, the Johnson Act, the Supremacy Clause, and the Fourteenth Amendment, an injunction to prevent their continued participation in the administration of the compacts, and an injunction to prevent the Governor from executing any additional compacts; (2) with respect to the Governor, a declaration that any compact with the Lytton Rancheria based on H.R. 5528 violates IGRA, the Johnson Act, the Supremacy Clause, and the Fourteenth Amendment, and an injunction to prevent the

Governor from entering into such a compact; and (3) with respect to the Governor, the Attorney General, the Director, and the Commission, a declaration that Article IV, Sec. 19(e) of the California Constitution and Cal.Penal Code §§ 330, 330a, 330b violate the Equal Protection Clause, and an injunction to prohibit enforcement of the Penal Code's general prohibition on class III gaming.

Plaintiffs and defendants have filed cross-motions for summary judgment on all claims, and the state defendants have filed a motion to dismiss. In addition to arguing that Proposition 1A and the compacts are consistent with IGRA, the Johnson Act, and the Fifth and Fourteenth Amendments, the state and federal defendants raise a number of jurisdictional objections. The court has also received several amicus curiae briefs.[42]

Before turning to the merits, it is necessary to address the multitude of objections to jurisdiction raised by the state and federal defendants and several amici curiae. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (federal courts must resolve jurisdictional issues before merits). The state defendants argue that: (1) the plaintiffs lack standing; (2) the state defendants are not proper defendants under 42 U.S.C. § 1983 or under *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); and (3) the case cannot proceed if the

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[42] Amicus curiae briefs have been filed on behalf of plaintiffs by (1) Blue Devils, Inc., Pinole Area Senior Foundation, Inc., First Baptist Church of El Sobrante, and Lidia Robinson; (2) California Cities for Self Reliance Joint Powers Authority; (3) National Coalition Against Gambling Expansion, Stand-Up for California, Committee on Moral Concerns; and (4) Wildcat Canyon Conservancy. Briefs on behalf of defendants have been filed by (1) Agua Caliente Band of Cahuilla Indians (2) BiPartisan Group of Officers and Members of the California Legislature; (3) California Nations Indian Gaming Association; and (4) Hotel Employees and Restaurant Employees International Union.

state defendants are dismissed because they are necessary and indispensable parties. The federal defendants challenge the court's jurisdiction under the APA. They contend that plaintiffs have no cause of action under the APA and that the plaintiffs are not within the zone of interests protected by IGRA. Finally, the court considers the arguments of amicus curiae, California Nations Indian Gaming Association ("CNIGA"), that the case must be dismissed because the absent Indian tribes are necessary and indispensable parties. Although all of these jurisdictional objections raise issues that potentially preclude the court from reaching the merits of the plaintiffs' claims, and have significantly increased the length and complexity of this opinion, all but a very few fail, and those that succeed do not greatly affect the scope of the inquiry on the merits.

## II. Standing

The requirements for demonstrating standing to sue are well-established. As an "irreducible minimum," *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), parties who seek to establish standing must show (1) a concrete and imminent "injury in fact", (2) a causal connection between the defendants and the alleged injury, and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir.2002). Invoking these concepts, the state defendants advance two arguments on standing. First, they argue that there is no injury in fact with respect to the Governor's future decisionmaking concerning additional compacts; and second they argue that there is no causation or redressability with respect to any of the state defendants.

A. *Injury in Fact and Equitable Relief as to Governor Davis on Counts II and III*

Plaintiffs who seek prospective injunctive relief must demonstrate both a sufficient likelihood of future injury, *Hawkins v. Comparet-Cassani,* 251 F.3d 1230, 1236 (9th Cir.2001), and that there is "a 'likelihood of substantial and immediate irreparable injury.' " *City of Los Angeles v. Lyons,* 461 U.S. 95, 111, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (quoting *O'Shea v. Littleton,* 414 U.S. 488, 502, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)); *see also Cole v. Oroville Union High Sch. Dist.,* 228 F.3d 1092, 1100 (9th Cir.2000). The former stems from the Article III case or controversy requirement; the latter is a function of the traditional limits on the power of federal courts to grant equitable relief. *Hodgers-Durgin v. De La Vina,* 199 F.3d 1037, 1042, 1044 (9th Cir.1999) (en banc). To determine the likelihood of future harm courts are guided "not only by the defendants' past conduct but also by the defendants' avowed future intent." *LaDuke v. Nelson,* 762 F.2d 1318, 1330 (9th Cir.1985). Further, when a plaintiff seeks to enjoin a state agency and its officers, the plaintiff must " 'contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs.' " *Midgett v. Tri-County Metro. Transp. Dist. of Oregon,* 254 F.3d 846, 850 (9th Cir.2001) (quoting *Rizzo v. Goode,* 423 U.S. 362, 378-79, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976)); *see also Hodgers-Durgin,* 199 F.3d at 1042 ("The Supreme Court has repeatedly cautioned that, absent a threat of immediate and irreparable harm, the federal courts should not enjoin a state to conduct its business in a particular way.").

1. *Count II: Existing and Future Compacts*

As to the Governor and future compacts, it is

unnecessary to determine whether the plaintiffs satisfy the Article III injury in fact requirement, because even if they did, plaintiffs would still not be entitled to injunctive relief to prevent the approval of additional compacts by the Governor because they have not demonstrated "a threat of immediate and irreparable harm." *Hodgers-Durgin,* 199 F.3d at 1042.[43]

The plaintiffs argue that there is an immediate threat of future injury because the Governor has already approved sixty-two compacts, the legislature has enacted an expedited approval provision, Cal. Gov't Code § 12012.25(b), and the Governor would be subject to suit if he failed to negotiate in good faith with a tribe that requests a class III gaming compact. 25 U.S.C. § 2710(d)(7). However, while the plaintiffs contend that as many as twenty tribes have expressed an interest in entering into gaming compacts, only two tribes have actually sought to enter into negotiations with the Governor following the approval of the first sixty-two compacts. (Eadington Decl. at ¶ 5). Negotiation of these compacts has not begun and the terms of these hypothetical compacts are, as yet, unknown. Moreover, it is also unclear if the Governor will approve additional compacts, especially compacts for casinos located in urban

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[43] Addressing the propriety of equitable relief while assuming that there is Article III standing does not run afoul of the rule against exercising hypothetical jurisdiction announced in *Steel Co.,* 523 U.S. 83, 118 S.Ct. 1003, because "there is no unyielding jurisdictional hierarchy." *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 578, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999). The court is, therefore, not required to address jurisdictional issues according to a specific checklist and may address jurisdictional issues in any order. *See Midgett,* 254 F.3d at 850; *Hodgers-Durgin,* 199 F.3d at 1042 n. 3. However, because of the similarities between the Article III inquiry and the standard for granting prospective injunctive relief, the plaintiffs are almost certainly unable to establish Article III standing to seek an injunction to prevent the Governor from entering into additional compacts.

areas which allegedly pose the greatest risk to the plaintiffs. In fact, the Governor has declined to enter into further negotiations at least until this lawsuit is resolved. In response to inquiries by the two tribes about entering into class III gaming compacts, the Governor replied negatively stating that "commencing formal negotiations at this time, amidst the uncertainty attending the current status of th[is] litigation, would not ... be prudent."[44] (Chang Letter, May 2, 2001, Exh. K to Pls.' Reply). The substantive legal issues presented in this lawsuit, and the greater policy and empirical issues that lie behind this litigation, are of such magnitude and complexity that it cannot be assumed that a responsible state officer would automatically continue to enter into further, identical compacts no matter the accumulation of experience, the pressures against permitting urban tribal gaming establishments, public opinion, and other potentially relevant economic and legal developments. The many unknowns about additional class III gaming compacts preclude a finding that there is a danger of an immediate and irreparable harm from future compacts when no such compacts are even in the negotiation stage.

When a plaintiff both satisfies Article III and demonstrates an immediate and irreparable injury, courts will appropriately grant prospective injunctive relief against state officials. *Lyons,* 461 U.S. at 111-12, 103 S.Ct. 1660. But where, as here, there is an inadequate showing of immediate future irreparable injury, the need to "maintain[ ] the delicate balance between 'federal equitable power and State administration of its own law,' " *Hodgers-Durgin,* 199 F.3d at 1042, compels deference to state officials who are in the consideration phase of their decisionmaking and have not

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[44] One of the letters was sent to nine tribes. (Chang Letter, May 2, 2001, Exh. K to Pls.' Reply). It is unclear, however, if all of the tribes requested negotiations.

committed to a future course of action. *Lyons,* 461 U.S. at 111-12, 103 S.Ct. 1660. Such restraint is especially important when the requested injunction is a broad one that would apply to "whole categories of potential future acts," in this case, any class III gaming compact. *Hillblom v. United States,* 896 F.2d 426, 431 (9th Cir.1990) (upholding district court's refusal to "declare the inapplicability to the Northern Mariana Islands of any law 'which substantially affects the lives of the inhabitants' "). Moreover, it is also relevant that the plaintiffs may seek declaratory relief as to the existing compacts, a less intrusive remedy than an injunction, and one that can resolve the most pressing issues related to Indian gaming under IGRA in a setting best suited to resolution in the federal courts because the terms of the compacts are not hypothetical. *See Steffel v. Thompson,* 415 U.S. 452, 465-68, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (describing declaratory relief as less intrusive remedy as compared to injunction); *Morrow v. Harwell,* 768 F.2d 619, 627 (5th Cir.1985) ("There is no question but that the passive remedy of a declaratory judgment is far less intrusive into state functions than injunctive relief that affirmatively commands specific future behavior under the threat of the court's contempt powers."). Having failed to demonstrate an immediate and irreparable harm, plaintiffs may not seek in count II prospective injunctive relief against the Governor to prohibit him from entering into additional compacts.

In addition, the plaintiffs' "failure to establish a likelihood of future injury similarly renders their claim for declaratory relief unripe" as to future, hypothetical compacts. *Hodgers-Durgin,* 199 F.3d at 1044. As the Ninth Circuit recently explained, "[i]n suits seeking both declaratory and injunctive relief against a defendant's continuing practices, the ripeness requirement serves the same function in limiting declaratory relief as the imminent-harm requirement serves in limiting injunctive relief." (*Id.*) Thus, for the same reason

that there is no imminent future injury that justifies prospective injunctive relief, the plaintiffs' claim for declaratory relief with respect to future compacts fails because it is unripe. *Texas v. United States,* 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' ").

With respect to the existing compacts and the Governor, the plaintiffs have properly alleged an injury in fact which could merit declaratory relief under the Declaratory Judgment Act, 22 U.S.C. §§ 2201 *et seq.* Plaintiffs allege both a violation of their right to equal protection of the laws and economic injury. Together these allegations form an adequate basis for standing to seek declaratory relief.[45]

In sum, as to count II, which in part seeks prospective injunctive and declaratory relief against the Governor, the court finds that plaintiffs have failed to demonstrate that they face an immediate and imminent threat of harm from future compacts. For this reason, plaintiffs are only entitled to seek declaratory relief as to existing compacts under count II.

2. *Count III: Lytton Rancheria*

A similar analysis applies to count III of the complaint which seeks declaratory and injunctive relief against the Governor with respect to the Lytton Rancheria. Because the Lytton Rancheria is no closer to entering into a gaming compact than any other tribe without a compact, plaintiffs' injuries with respect to count III are no more imminent than

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[45] Because the plaintiffs have viable claims under federal law, *Skelly Oil v. Phillips Petroleum,* 339 U.S. 667, 70 S.Ct. 876, 94 L.Ed. 1194 (1950), does not preclude plaintiffs from seeking a declaratory judgment. (St. Defs.' Motion at 64).

they are with respect to count II. Although the Municipal Services Agreement between the Lytton Rancheria and San Pablo states that the Lytton Rancheria will seek to enter into negotiations for a class III gaming compact, it has not yet done so. (St. Defs.' SUF at ¶ 24). Moreover, because it would permit gaming in an urban area, an eventuality that the plaintiffs contend would be novel and particularly damaging to existing gaming operations, the Governor might be even more reluctant to negotiate a compact with the Lytton Rancheria. For these reasons, equitable relief is improper because there is no threat of immediate and irreparable harm that would warrant an injunction, and the plaintiffs' request for declaratory relief is, therefore, unripe.

Further, plaintiffs may not establish jurisdiction on the basis that they have been deprived of a procedural right to petition the Governor and the Secretary concerning the potential adverse affects of a proposed casino. (Pls.' Reply at 39-41). Assuming that § 2719 may afford plaintiffs a procedural right of consultation that was foreclosed by the San Pablo legislation,[46] any such procedural right is not implicated until a tribe requests negotiations for a class III gaming compact on land that was acquired after October 17, 1988. Therefore, Congress' decision to "backdate" the acquisition of the San Pablo land is of no consequence unless and until the Lytton Rancheria seeks to enter into a class III gaming compact. Because any attempt to exercise rights based on § 2719 at this point in time would be premature, plaintiffs' argument that the San Pablo legislation deprived

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[46] The Ninth Circuit applies a different rule to procedural standing claims and requires plaintiffs to show: "(1) that it has been accorded a procedural right to protect its interests, and (2) that it has a threatened concrete interest that is the ultimate basis of its standing." *Churchill County v. Babbitt,* 150 F.3d 1072, 1078 (9th Cir.1998). The court does not reach the question of the full extent of the plaintiffs' procedural rights, if any, under 25 U.S.C. § 2719.

them of procedural rights under § 2719 is also not suited for review.

B. *Causation*

To demonstrate causation, the plaintiffs' alleged injuries--competitive economic harm and violation of equal protection--must be "fairly traceable" to the defendant's conduct, *Pritikin v. Dep't of Energy,* 254 F.3d 791, 796 (9th Cir.2001), and the injuries must not be " 'the result of the independent action of some third party not before the court.' " *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)(quoting *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)). Further,

> [w]hen ... a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed [than when the plaintiff is the subject of the government's regulation]. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction--and perhaps on the response of others as well.

*Lujan,* 504 U.S. at 562, 112 S.Ct. 2130 (emphasis in original); *see also G & G Fire Sprinklers, Inc. v. Bradshaw,* 156 F.3d 893, 899-900 (9th Cir.1998) (same). Thus, in order to demonstrate causation, plaintiffs must show that the alleged harms flow directly from the state defendants' actions.

1. *Count II: Governor, Commission, and Director*

With respect to count II of the complaint, plaintiffs' claim against the Governor satisfies the causation requirement because the Governor approved the compacts that gave rise to the plaintiffs' injuries. (Complaint at ¶¶ 23, 79). It is not material to the causation analysis that Governor Davis does not have ongoing responsibilities under the compacts, once approved. It is enough that his past approval of the compacts caused the plaintiffs' alleged injuries.

Plaintiffs have failed, however, to adequately respond to the state defendants' argument that neither the Director nor the Commission have duties that caused class III tribal gaming. (St. Defs.' Motion for Summary Judgment at 12). Without addressing the issue of causation, plaintiffs' argue only that there is redressability because an injunction preventing the Director and the Commission from renewing their determinations of suitability for persons working in or with the casinos would hamper the casinos' ability to operate. Because causation and redressability are frequently duplicative of one another, plaintiffs presumably hope that in establishing redressability, they will also establish causation.

Causation and redressability, however, are not always two sides of the same coin. "Despite ... similarities, ... each inquiry has its own emphasis. Causation remains inherently historical; redressability quintessentially predictive." *Freedom Republicans, Inc. v. Federal Election Comm'n,* 13 F.3d 412, 418 (D.C.Cir.1994); *see also Allen v. Wright,* 468 U.S. 737, 753 n. 19, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (noting differences between causation and redressability). Here, even if the plaintiffs established redressability, their predictions about the impact of an injunction on the Director and the Commission would not establish an historical connection between the actions of the Director and the Commission, and the plaintiffs' injuries.

As to redressability, plaintiffs rely principally on §§ 6.4.4(b), 6.4.5, 6.4.6, of the compacts which, subject to certain exceptions, prohibit persons from working in or with casinos, or from financing them, if they had an application for a determination of suitability denied by the State Gaming Agency. (Pls.' Reply at 68; Pls.' Reply to St. Defs.' SUF at ¶ 23). These provisions might suggest that the State Gaming Agency is responsible for licensing most persons who work in or with Indian casinos. If true, this might satisfy the causation requirement because without the Director and the Commission fulfilling their licensing duties, tribal gaming might not have been possible.

Yet, a closer reading of the compacts reveals that the licensing responsibilities of the State Gaming Agency are relatively minor. Rather, the Tribal Gaming Agency has primary responsibility for issuing licenses to virtually every person who works in or with Indian casinos.[47] (Compact § 6.4.1). Sections 6.4.4(b), 6.4.5, and 6.4.6, of the compacts merely prohibit the Tribal Gaming Agency from licensing persons who have had determinations of suitability denied by the State Gaming Agency, but they do not require persons working in or with tribal casinos to apply for licenses from the State Gaming Agency.[48] Thus, even if the licensing of

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[47] Section 6.4.1 of the compacts states:

> All persons in any way connected with the Gaming Operation or Facility who are required to be licensed or to submit to a background investigation under IGRA, and any others required to be licensed under this Gaming Compact, including, but not limited to, all Gaming Employees and Gaming Resource Suppliers, and any other person having a significant influence over the Gaming Operation must be licensed by the Tribal Gaming Agency.

[48] The compacts state that except for "non-key Gaming Employees," the Tribal Gaming Agency must require all license applicants to file an application with the State Gaming Agency for a determination of

such persons satisfied the causation requirement, the compacts themselves demonstrate that it is the actions of the Tribal Gaming Agency, and not the State Gaming Agency, that are fairly traceable to the plaintiffs' injuries.

Finally, even if they had established causation, plaintiffs have not demonstrated redressability. An injunction to prevent the State Gaming Agency from issuing or renewing determinations of suitability would do little to hamper the casinos' ability to operate because virtually all persons receive both their initial licenses and license renewals from the Tribal Gaming Agency.

2. *Count IV: Attorney General, Director, Commission and Penal Code Enforcement*

The state defendants offer two arguments as to why there is no causation with respect to count IV of the complaint which seeks to enjoin the Attorney General, the Director, and the Commission from enforcing Penal Code §§ 330, 330a, 330b, the state criminal law provisions that prevent the plaintiffs from offering class III gaming. First, the state defendants argue that there is no causal connection between the Attorney General and the alleged harm, class III gaming by Indian Tribes. (St. Defs.' Motion for Summary Judgment at 12-13). This argument, however, incorrectly treats the alleged harm under count IV as class III gaming by Tribes in violation of IGRA and the Equal Protection Clause, when the actual harm alleged here is the inequitable application of the Penal Code provisions to the plaintiffs thereby preventing

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suitability for licensure under the California Gambling Control Act. *Id.* at § 6.5.6. The compacts, however, do not distinguish "non-key Gaming Employees" from "key Gaming Employees," and the plaintiffs have failed to provide any evidence to support a causal connection between the State Gaming Agency's act of licensing these persons, "key Gaming Employees," and the plaintiffs' injuries.

them from offering class III gaming. (Complaint at 32-33). If the plaintiffs' allegations are correct, then they are entitled to seek this relief because the equal protection violation may be remedied either by prohibiting class III gaming as to every one, or by permitting it as to every one.[49]

The state defendants next argue that there is no causation because none of the individuals named in count IV, the Attorney General, the Director, and the Commission, has authority to prevent all enforcement of the Penal Code provisions, for example, by a District Attorney. (St. Defs.' Motion for Summary Judgment at 13). This argument confuses causation analysis with redressability.[50] The question is not whether these defendants can prevent enforcement of the Penal Code provisions. Rather, the causation question is whether the alleged injury--the threatened or actual enforcement of the Penal Code provisions against the plaintiffs such that they are unable to offer the same class III gaming offered by the tribes--is fairly traceable to the state defendants. The history of letters written by the Attorney General and the Director to the plaintiffs and other California card clubs, as well as their

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[49] The state defendants argue that the court should abstain from granting the plaintiffs' requested relief under *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). (St. Defs.' Motion for Summary Judgment at 56). However, because *Younger* abstention is not jurisdictional, and because the plaintiffs are not entitled to injunctive relief under count IV, it is unnecessary to address the applicability of *Younger. See Benavidez v. Eu,* 34 F.3d 825, 829 (9th Cir.1994) (citing *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 358-59, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989)).

[50] Redressability is not a problem as to count IV. First, it is likely that the District Attorneys will follow the court's ruling, especially given their tendency to look to the Attorney General for policy on gaming. Second, for purposes of Article III, it is sufficient that redressability is likely; plaintiffs need not establish it with absolute certainty. *See infra* pp. 1107-09.

interaction with local law enforcement officials adequately satisfies the causation requirement. "Here, there has clearly been a specific threat of prosecution ... [and] such an express threat instills a fear of criminal prosecution that cannot be said to be 'imaginary or wholly speculative.' " *Culinary Workers Union, Local 226 v. Del Papa,* 200 F.3d 614, 617 (9th Cir.1999).

Specifically, in 1988, then Attorney General Van De Kamp and the Manager of the Gaming Registration Program wrote to Artichoke Joe's stating that if Artichoke Joe's offered a game called "Texas hold-em," it would be in violation of Cal.Penal Code § 330 and "administrative action will be taken against [its] registration." (Van de Kamp, Watson Letter, Exh. O to Pls.' Motion). The letter was also sent to local law enforcement officials. (*Id.*) Similarly, in 1989, Attorney General Van de Kamp and the Director of the Division of Law Enforcement sent a notice to all "California Card Club Owners," a category that includes several of the plaintiffs, stating that if they offered "percentage games," they would be in "violation of the Penal Code and the Gaming Registration Act which may result in administrative action on the part of the State Gaming Registration Program as well as possible criminal prosecution." (Van de Kamp, Clemens Letter, Exh. P to Pls.' Motion). Another letter that year addressed to "California Card Club Owners" again warned of administrative action and "possible criminal prosecution" if they offered "jackpot poker." (Van de Kamp, Clemens Letter, Exh. Q to Pls.' Motion). In 1997, Attorney General Lungren and the Manager of the Office of Gaming Registration notified all card club owners that percentage card games are illegal. (Van de Kamp, Letter Exh. R to Pls.' Motion). The letter was also sent to "All Affected Law Enforcement Agencies," and it stated that the Attorney General was requesting that "they monitor compliance to ensure that all gaming clubs are charging the proper fees of

their patrons." (*Id.*)

Moreover, Attorney General Lockyer and the current Director of the Division of Gambling Control, Harlan Goodson, have published several law enforcement advisories on issues related to gambling. One advisory, sent to "All Police Chiefs and Sheriffs," described "Tab Force," an illegal bingo operation. (Tab Force Advisory, Exh. S to Pls.' Motion). The letter noted that although the Division of Gambling Control lacked jurisdiction over bingo operations, it could investigate suspected violations of state gambling laws and provide advice to local law enforcement agencies for use in the regulation of bingo. (*Id.*) The letter specifically advised law enforcement agencies that "Tab Force constitutes an unlawful gambling device within the meaning of sections 330b and 330.1 of the Penal Code." (*Id.*) In other advisories, the Attorney General and the Director discussed what constitutes a "Gaming Activity," the need for card clubs to report to the Division of Gambling Control the forms of gambling offered by the clubs, and the legality of "Jackpot Poker." (Exh. N to Pls.' Motion). On at least one occasion in 1998, the San Bruno District Attorney wrote to the Director to inquire about the legality of a specific gaming practice and whether it constituted an illegal percentage game. (Exh. T to Pls.' Motion). The District Attorney's letter specifically stated that Artichoke Joe's had requested an opinion on the game and that the District Attorney was seeking the opinion of the Division of Gaming Control because "[w]e need to have a uniform policy in the state in order that card clubs can have a level playing field upon which to conduct their games." (*Id.*)

As in *Culinary Workers Union, Local 226,* where the Ninth Circuit found a case or controversy because the Attorney General had written a letter specifically threatening to cause the statute to be enforced, the Attorney General and

the Director have an unambiguous record of warning clubs of potential criminal prosecution and administrative action if they violate Penal Code provisions prohibiting class III gaming. They also have taken the lead in setting statewide policy with respect to gambling. Thus, the threat of criminal prosecution under the Penal Code provisions by these defendants, as well as administrative action, is not " 'imaginary, speculative or chimerical.' " *Snoeck v. Brussa,* 153 F.3d 984, 987 (9th Cir.1998) (quoting *Shell Oil Co. v. Noel,* 608 F.2d 208, 213 (1st Cir.1979)). For these reasons, the plaintiffs have satisfied the Article III causation requirement as to the Attorney General and the Director.

The plaintiffs have failed, however, to provide evidence demonstrating that the threat of enforcement of the Penal Code provisions is fairly traceable to the Commission. None of the documents provided by the plaintiffs bears the names of any of the members of the Commission. Thus, although the Commission may well be empowered to revoke plaintiffs' gaming licenses if they violate the Penal Code provisions, the plaintiffs have done nothing more than restate their original allegations to this effect. This is insufficient to survive a motion for summary judgment. *Los Angeles County Bar Ass'n v. Eu,* 979 F.2d 697, 700 (9th Cir.1992) ("At the summary judgment stage, the plaintiff must set forth specific facts, rather than mere allegations, that if true would suffice to establish standing.").

In summary, as to causation, the court finds that with respect to count II, plaintiffs have satisfied the causation requirement as to the Governor, but not the Director or the Commission. With respect to count IV, plaintiffs have satisfied the causation element as to the Attorney General and the Director, but not the Commission.[51]

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[51] For similar reasons, the claim against the Director and the Commission does not meet the causation requirement of *Ex parte Young,*

C. *Redressability: Governor and Count II*

To establish redressability, plaintiffs must show that it is "likely, as opposed to merely speculative that the injury will be redressed by a favorable decision." *Bernhardt v. County of Los Angeles,* 279 F.3d 862, 869 (9th Cir.2002). A "claim may be too speculative if it can be redressed only through 'the unfettered choices made by independent actors not before the court.' " *Id.* (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). However, a plaintiff can still satisfy the redressability requirement in such a case by meeting "the burden ... to adduce facts showing that those choices have been or will be made in such manner as to ... permit redressability of injury." *Lujan,* 504 U.S. at 562, 112 S.Ct. 2130. Thus, in *Franklin v. Massachusetts,* 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), decided less than two weeks after *Lujan,* the Court held that the plaintiffs satisfied redressability in a suit brought against the Secretary of Commerce to require her to reallocate the apportionment of overseas military personnel in the 1990 census, even though the President would make a final determination on the census. A plurality of the Court held that declaratory relief against the Secretary would redress the plaintiffs' injuries because "she has an interest in litigating [the census's] accuracy ... [and] it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination." *Id.* at 803, 112 S.Ct. 2767. Therefore, although redressability depended at least in part on the actions of third

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209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) as to count II, and the claim against the Commission does not meet this requirement as to count IV.

parties, the Court was satisfied that the third parties would follow and enforce the law thus making redressability likely.[52]

As to count II and the IGRA and equal protection claims on the existing compacts, the state defendants contend that redressability is too speculative to support standing because the tribes are not parties to the suit and a decision in the plaintiffs' favor would, therefore, not be binding on them. (St. Defs.' Motion for Summary Judgment at 13). Moreover, they argue that if the court invalidates the compacts and Proposition 1A, the State would lose its power to stop any continued class III gaming because, in the absence of a valid IGRA-sanctioned compact, 18 U.S.C. § 1166 gives the federal government exclusive enforcement authority over Indian gaming. (*Id.* at 13- 14). *See United States v. E.C. Investments, Inc.*, 77 F.3d 327, 330 (9th Cir.1996) ("Section 1166(d) grants the United States 'exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country.' "). Thus, the state defendants contend that if the plaintiffs prevail on the merits, the state defendants will be powerless to stop any illegal Indian gaming.

The state defendants' arguments are misplaced for several reasons. First, the plaintiffs do not need to prove a negative,

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[52] *See also Made in the USA Foundation v. United States*, 242 F.3d 1300, 1306-11 (11th Cir.2001) (finding redressability in suit challenging constitutionality of the North American Free Trade Agreement and that even though President could not be ordered to terminate participation in NAFTA, judicial order would be followed by subordinates); *Los Angeles County Bar Ass'n*, 979 F.2d at 701 (redressability requirement was satisfied in suit against Governor and Secretary of State claiming injury due to lack of judges in Los Angeles County because it was substantially likely that the California legislature, although its members were not parties to the action, would abide by the court's declaration) (citing *Franklin*, 505 U.S. at 803, 112 S.Ct. 2767).

namely that the tribes would not engage in illegal gaming in order to demonstrate redressability. If plaintiffs had to "negate ... speculative and hypothetical possibilities ... in order to demonstrate the likely effectiveness of judicial relief," they would rarely ever be able to establish standing. *Duke Power Co. v. Carolina Envtl. Study Group,* 438 U.S. 59, 73, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

Second, even if the tribes were inclined to violate IGRA and state penal code prohibitions, there is no reason to assume that the federal government would shirk its enforcement responsibilities under 18 U.S.C. § 1166 by countenancing illegal class III gaming by Indian tribes. Thus, although redressability may depend, at least in part, on the actions of third parties, this case more closely resembles *Franklin* than it does *Lujan.* Indeed, unlike in *Lujan* where it was unclear whether outside agencies would be bound by the Secretary of the Interior's interpretation to require consultation for international projects, a ruling that invalidates the compacts and Proposition 1A would conclusively establish the illegality of any continued class III gaming by Indian tribes. *Lujan,* 504 U.S. at 555, 112 S.Ct. 2130. The sole contingency, therefore, would be whether the federal authorities responsible for prosecuting illegal gaming would do so, and, as in *Franklin, Made in the USA,* and *E.C.,* the court is entitled to expect that they will follow the law.

Because "[p]laintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision," it is likely, and not merely speculative, that a declaratory judgment invalidating the existing compacts and Proposition 1A would redress the plaintiffs' injuries. *Graham v. Fed. Emergency Mgmt. Agency,* 149 F.3d 997, 1003 (9th Cir.1998); *see also Competitive Enter. Inst. v. National Highway Traffic Safety Admin.,* 901 F.2d 107, 117-18 (D.C.Cir.1990) ("Petitioners need not prove that granting

the requested relief is certain to redress their injury, especially where some uncertainty is inevitable.").

Therefore, the court concludes that the plaintiffs have demonstrated that a favorable ruling would likely redress their alleged injuries.

## III. Ex Parte Young[53]

The *Ex parte Young* exception to the Eleventh Amendment permits suits for prospective declaratory or injunctive relief if suit is brought against a state official acting in an official capacity. *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The "obvious fiction" of *Ex parte Young,* however, only stretches so far and is subject to several constraints. *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 270, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).[54]

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[53] The analysis in this section also applies to the state defendants' arguments, (St. Defs.' Motion for Summary Judgment at 42-44), that they are not liable under 42 U.S.C. § 1983 because they were not personally involved in the alleged violations of federal law. *See Jones v. Williams,* 286 F.3d 1159, 1163 (9th Cir.2002) (noting that there is no respondeat superior liability under § 1983 and that claim must be predicated on defendant's personal action). Because the personal involvement requirement for § 1983 and the causal connection requirement for *Young* are so similar, and largely serve the same purposes, the court's determination that the state defendants may be sued under *Young* also establishes that they are proper defendants under § 1983.

[54] The constraints on *Ex parte Young* imposed by *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), and *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997), do not apply in this case. First, Congress did not create a detailed remedial scheme to enforce section 2710(d)(1), which permits class III gaming on certain conditions, unlike the provisions of IGRA which the Court held could not be enforced by an *Ex parte Young* action in *Seminole Tribe,* 517 U.S. at 74, 116 S.Ct. 1114. Second, *Coeur d'Alene* does not apply because a decision favorable to the plaintiffs would not implicate California's special sovereignty interests. *See Agua Caliente Band of Cahuilla Indians v. Hardin,* 223 F.3d 1041, 1048 (9th

For example, *Young* may not be invoked to provide declaratory relief against a state official for a wholly past violation of federal law, *Green v. Mansour,* 474 U.S. 64, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985), unless accompanied by an ongoing violation of federal law. *Papasan v. Allain,* 478 U.S. 265, 282, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). Another important limit on *Young* is the causation requirement. As the Court explained in *Young,* not every state officer is subject to suit simply by virtue of being a state officer. Rather, the "officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party." *Ex parte Young,* 209 U.S. at 157, 28 S.Ct. 441. Further, the "connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Los Angeles County Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir.1992). However, a plaintiff's failure to link a state officer's actions to a specific enforcement proceeding will not preclude a *Young* suit if the conduct does not generally give rise to enforcement proceedings, and the state officer is shown to have a direct connection to the alleged harm. *Compare Snoeck v. Brussa,* 153 F.3d 984, 987 (9th Cir.1998) (Nevada Commission on Judicial Discipline was not a proper defendant under *Young* because it lacked a

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Cir.2000) ("We start with the principle that the *Young* doctrine is alive and well and that *Coeur d'Alene* addressed a unique, narrow exception not present here. We do not read *Coeur d'Alene* to bar all claims that affect state powers, or even important state sovereignty interests."). Finally, because the Ninth Circuit has held that "[t]he viability of *Ex parte Young* as traditionally applied survives the Supreme Court's treatment of the issue in *Idaho v. Coeur d'Alene Tribe,*" there is no need to consider whether plaintiffs may bring an action under *Young* when a state forum is available to litigate their federal claims. *Id.* at 1050 (quoting *Doe v. Lawrence Livermore Nat'l Lab.,* 131 F.3d 836, 839 (1997)).

direct connection to enforcement proceedings where challenged conduct included potential contempt of court that could only be imposed by Nevada Supreme Court), *with Los Angeles County Bar Ass'n,* 979 F.2d at 704 (Governor and Secretary of State were proper defendants under *Young,* notwithstanding absence of their direct connection to enforcement proceedings, because the challenged conduct did not give rise to such proceedings and they had a direct connection to the alleged harm).

A. *Count II: Existing Compacts as to Governor, Director, and Commission*

The Governor is a proper party subject to suit under the *Young* doctrine because the plaintiffs' claims are "not based on any general duty to enforce state law." *Id.* Rather, the Governor is alleged to have "a specific connection to the challenged statute." *Id.* Indeed, for the same reasons that the Governor is claimed to have caused the plaintiffs' alleged injuries for purposes of Article III standing, he is also a proper defendant under *Young:* The Governor negotiated and approved the compacts that give rise to the plaintiffs' alleged injuries. *Culinary Workers Union, Local 226,* 200 F.3d at 619 (applying Article III causation analysis to *Young*); *Deida v. City of Milwaukee,* 192 F.Supp.2d 899, 916-17 (E.D.Wis.2002) (causal connection requirement under *Young* "closely overlap[s] with the causation and redressability inquiries for standing"). If the plaintiffs' allegations are correct, the Governor violated federal law--IGRA and the Equal Protection Clause--his actions are ultra vires, and he is subject to suit under *Young.*

Moreover, although the Governor's conduct that gave rise to the claimed violations of federal law has already occurred, declaratory relief remains an appropriate remedy under *Young* because the plaintiffs allege ongoing violations of

federal law due to the Governor's approval of the compacts. In *Papasan* the Court addressed the viability of *Young* in actions for declaratory relief based on past conduct that gives rise to an ongoing violation. The plaintiffs challenged Mississippi's system of funding public schools in areas that had received federal school land grants. The lands had long since been sold by the State, and a substitute appropriation made, but the schools in areas where the land had been sold received less money for their schools from the appropriation than they would have if the lands had been retained. The plaintiffs alleged that Mississippi's past actions in selling the lands caused the present disparity in school funding that violated the state's trust responsibilities and the Equal Protection Clause. While finding that the alleged trust violation was the kind of wholly past violation and request for restitution that would not survive the Eleventh Amendment, the Court agreed that the Equal Protection claims fell within *Young:* "This alleged ongoing constitutional violation--the unequal distribution by the State of the benefits of the State's school lands--is precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young.*" *Papasan,* 478 U.S. at 282, 106 S.Ct. 2932.

As in *Papasan,* the plaintiffs also allege ongoing violations of federal law. They argue that the compacts now in effect violate IGRA and the Equal Protection Clause and place them at a disadvantage. The plaintiffs' alleged injuries from their inability to compete continue until the compacts come to an end, which might not be until 2020. (Compact at § 11.2.1). Thus, as in *Papasan, Young* applies because the Governor's past approval of the compacts also causes ongoing claimed violations of federal law that presently harm the plaintiffs. *Papasan,* 478 U.S. at 282, 106 S.Ct. 2932 ("the essence of the equal protection allegation is the present disparity in the distribution of the benefits of state-

held assets and not the past actions of the State").

B. *Count IV: Penal Code Enforcement and Attorney General, Director, and Commission*

Plaintiffs may also rely on the *Young* doctrine to pursue their claims against the Attorney General and the Director of the Division of Gambling Control to enjoin enforcement of the Penal Code provisions. For the same reasons that the claim against the Attorney General and the Director satisfies the Article III causation requirement, the claim also meets the causal connection requirement under *Young:* The Attorney General and the Director have repeatedly warned plaintiffs not to violate the relevant Penal Code provisions barring Las Vegas style gambling. Thus, unlike in *Long v. Van de Kamp,* 961 F.2d 151 (9th Cir.1992) and *Southern Pacific Transp. Co. v. Brown,* 651 F.2d 613 (9th Cir.1980), the Attorney General and the Director are not being sued solely because they have general supervisory responsibilities to enforce state law. To the contrary, as in *Culinary Workers Union, Local 226,* they have made specific warnings of criminal prosecution and administrative action. Therefore, the Attorney General and the Director have a sufficient causal connection to the enforcement of the statute for purposes of *Young.*[55]

Thus, the court concludes that as to count II, plaintiffs may bring an action under *Ex parte Young* against the Governor. As to count IV, plaintiffs may bring an *Ex parte Young* suit against the Attorney General and the Director.

## IV. Administrative Procedure Act[56]

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[55] Similarly, the Commission lacks a causal connection to the plaintiffs' injuries for the same reason that its actions are not "fairly traceable" for purposes of Article III standing.

[56] It is unnecessary to reach the federal defendants' arguments as to count

The federal defendants pose the next series of jurisdictional questions by challenging plaintiffs' standing and the availability of judicial review under the APA. The APA creates a cause of action for persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, except to the extent the relevant statute "preclude[s] judicial review" or the agency action "is committed to agency discretion." 5 U.S.C. §§ 701(a)(1), (2). The federal defendants argue that in the case of IGRA and the Johnson Act, both §§ 701(a)(1) and (2) apply to preclude judicial review of the plaintiffs' claims under the APA. The federal defendants also contend that the plaintiffs lack standing to sue under § 702 of the APA because they are not within the zone of interests sought to be protected by IGRA and the Johnson Act.

A. *Section 701(a)(1)*

The APA creates a "right of action" to challenge final agency action that is presumptively available even without "[a] separate indication of congressional intent to make agency action reviewable under the APA." *Japan Whaling Ass'n v. American Cetacean Soc'y,* 478 U.S. 221, 230 n. 4, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986). Because of this "strong presumption," *Bowen v. Michigan Acad. of Family Physicians,* 476 U.S. 667, 670, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986), the court may find that IGRA and the Johnson Act "preclude judicial review" according to § 701(a)(1) only if there is "clear and convincing evidence" that Congress intended to foreclose the availability of an APA remedy. *Block v. Community Nutrition Inst.,* 467 U.S. 340, 348, 350, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). The term "clear and

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convincing evidence," however, is something of a misnomer since it does not refer to a quantum of evidence "in the strict evidentiary sense." *Id.* at 350, 104 S.Ct. 2450. "Rather, the Court has found the standard met, and the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.' "[57] *Id.* at 351, 104 S.Ct. 2450 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 157, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)). Specifically, the court should find the necessary intent to preclude review if review would permit plaintiffs tc "evade the statutorily envisioned review mechanisms in favor of those established by the APA." *Overton Power Dist. No. 5 v. O'Leary,* 73 F.3d 253, 256 (9th Cir.1996).

There is nothing in the relevant structure of IGRA or the Johnson Act to suggest that Congress intended to preclude the type of APA review sought here by the plaintiffs. Unlike *Community Nutrition Institute* where the availability of an APA cause of action for milk consumers would have undermined detailed procedures milk processors had to follow in order to challenge milk prices under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.,* allowing plaintiffs' APA claims will not frustrate the regulatory structure of either IGRA or the Johnson Act.[58]

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[57] According to *Community Nutrition Institute,* Congress' intent to overcome the presumption in favor of judicial review of agency action under § 701(a)(1) is revealed by "(1) specific statutory language, (2) specific legislative history, (3) contemporaneous judicial construction followed by congressional acquiescence, (4) the collective import of the legislative and judicial history of the statute, and (5) inferences drawn from the statutory scheme as a whole." 3 K. Davis & R. Pierce, Jr., *Administrative Law Treatise* § 17.8 at 153-54 (3d ed.1994). The court only considers inferences drawn from the statutory scheme because there is no suggestion or evidence that any of the other four categories noted in *Community Nutrition Institute* apply.

[58] Similarly, the federal defendants' reliance on *Morris v. Gressette,* 432

The federal defendants are correct that IGRA contemplates a multitude of specific causes of action that may be brought by specified entities or persons. *See Florida v. Seminole Tribe of Florida,* 181 F.3d 1237, 1248 (1999) (listing causes of action created by IGRA including 25 U.S.C. § 2710(d)(7)(A)(ii) (authorizing state or tribal suit to enjoin class III gaming conducted in violation of compact); 25 U.S.C. § 2710(d)(7)(A)(iii) (authorizing suit by Secretary of Interior to enforce procedures for conducting class III gaming); 25 U.S.C. § 2711(d) (authorizing tribal suit to compel Chairman of the NIGC either to approve or to disapprove management contract); 25 U.S.C. § 2713(a)(2), (b)(2) (creating right to hearing before NIGC regarding fine imposed or temporary closure ordered by Chairman); 25 U.S.C. §§ 2713(c), 2714 (authorizing appeal to district court of NIGC fines, permanent closure orders, and certain other decisions)). But the inclusion of remedies in IGRA for specific entities or persons only supports an inference that Congress intended to preclude others from bringing the same kind of claims under the APA. As the Court observed in *Community Nutrition Institute,* 467 U.S. at 349, 104 S.Ct. 2450, "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly concluded."

Thus, the federal defendants' implicit reliance on the legal maxim expressio unius est exclusio alterius--the expression of one implies the exclusion of others--to argue

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U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977) for the proposition that litigation-induced delays in agency approval procedures might preclude judicial review is misplaced. (Fed. Defs.' Motion at 36). Unlike the sections of the Voting Rights Act reviewed in *Morris,* there are no comparable provisions in IGRA indicating congressional concern with timing or delay.

that the inclusion of specific remedies for some parties impliedly precludes all other parties and all other APA claims is not warranted. (Fed. Defs.' Motion at 33-35). The starting point of preclusion analysis is "the strong presumption that Congress intends judicial review of administrative action." *Bowen*, 476 U.S. at 670, 106 S.Ct. 2133. This presumption is inconsistent with the federal defendants' reliance on a robust expressio unius doctrine because it would create the reverse presumption, one against APA review for most statutes.

Nor have the federal defendants demonstrated that the plaintiffs' APA claims would undermine IGRA or the Johnson Act. Noticeably absent from the list of IGRA-created remedies is one that addresses the type of claim brought by the plaintiffs--a mechanism for challenging the Secretary's approval of a compact on the basis that the compact violates IGRA.[59] In the absence of an explicit remedy under IGRA, permitting plaintiffs to proceed under the APA would not encourage parties to circumvent statutorily envisioned review mechanisms, and, therefore, "the general presumption favoring judicial review of administrative action is controlling."[60] *Community Nutrition*

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[59] Federal defendants concede in their Reply that they do not contest the plaintiffs' use of the APA to object to the Secretary's actions on constitutional grounds. (Fed. Defs.' Reply at 28). *See Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) (noting that Congress must be especially clear when it intends to foreclose judicial review of constitutional claims under a particular statute).

[60] The federal defendants' insistence that the absence of an implied private right of action under IGRA precludes the plaintiffs' APA claims is equally unavailing. (Fed. Defs.' Motion at 31). The defendants are correct that there is no evidence that Congress intended a private right of action to enforce IGRA. *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1245-50 (11th Cir.1999) (no private right of action under IGRA); *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1049 (11th Cir.1995) (same). However, it is well-established that an APA

*Institute,* 467 U.S. at 351, 104 S.Ct. 2450.

For these reasons, the plaintiffs' claims under the APA are not precluded by § 701(a)(1).[61]

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claim is available even in the absence of an implied private cause of action. *See Hein v. Capitan Grande Band of Diegueno Mission Indians,* 201 F.3d 1256, 1260-61 (9th Cir.2000) (tribe lacked private right of action under IGRA but could proceed under APA); *Oregon Natural Res. Council v. United States Forest Serv.,* 834 F.2d 842, 851 (9th Cir.1987) ("an implied private right of action under a violated statute is not a necessary predicate to a right of action under the APA"); *Rapid Transit Advocates, Inc. v. Southern California Rapid Transit Dist.,* 752 F.2d 373, 377 (9th Cir.1985) (same). This is a predictable outcome because there is a strong presumption that Congress intended judicial review of agency action under the APA, while courts presume that Congress did not intend implied private rights of action. *Compare Japan Whaling Ass'n,* 478 U.S. at 230 n. 4, 106 S.Ct. 2860 (noting that right of action is available under the APA "absent some clear and convincing evidence of legislative intent to preclude review") *with Cannon v. University of Chicago,* 441 U.S. 677, 731, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (Powell, J., dissenting) ("Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.")

[61] The federal defendants argue that two cases, *Jackson v. United States,* 485 F.Supp. 1243 (D.Alaska 1980) and *San Xavier Dev. Auth. v. Charles,* 237 F.3d 1149 (9th Cir.2001), hold that the plaintiffs do not have a remedy under the APA because "there is no substantive right for third party review of Indian contracts." (Federal Defs.' Reply at 30). Neither case, however, states such a broad holding. First, *Jackson* is not binding authority, and the court found that there was no APA claim because the plaintiffs had not independently established subject matter jurisdiction. *Jackson,* 485 F.Supp. at 1249. Here, as in virtually all cases brought under the APA, "subject only to preclusion-of-review statutes created by Congress," federal jurisdiction is provided by 42 U.S.C. § 1331. *Califano v. Sanders,* 430 U.S. 99, 106, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); Complaint at ¶ 2 (stating that jurisdiction for the APA claim is based on 28 U.S.C. § 1331); *see also Robbins v. Reagan,* 780 F.2d 37, 43 (D.C.Cir.1985) (applying *Califano;* "district court always has jurisdiction to review federal administrative action under 28 U.S.C. § 1331"). Because neither IGRA nor the Johnson Act contains a preclusion of review provision, the court has subject matter jurisdiction under 28

B. *Section 701(a)(2)*

In contrast to the strong presumption that agency action is subject to judicial review under the APA, there is a contrary presumption against judicial review of an agency's decision not to undertake an enforcement action because such decisions are generally committed to agency discretion. *Heckler v. Chaney,* 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) (no APA cause of action to review Food and Drug Administration decision not to take enforcement actions under Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.*). The logic of *Chaney* is that judicial review of agency decisions not to take enforcement action is generally precluded under § 701(a)(2) because such decisions involve "a complicated balancing of a number of factors which are peculiarly within [the agency's expertise]" and because "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830, 105 S.Ct. 1649. Section 701(a)(2), however, represents "a very narrow exception" to judicial review of administrative action. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

Section 701(a)(2) and *Chaney* do not apply here for several reasons, not the least of which is that plaintiffs do not challenge an agency's failure to enforce a statute. (Fed. Defs.' Motion at 37-39). Under IGRA, a class III gaming compact is not valid until it is approved by the Secretary of the Interior and published in the Federal Register. *See* 25 U.S.C. § 2710(d)(3)(B). In this case, the Secretary of the

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U.S.C. § 1331, and the plaintiffs have a cause of action under the APA. Second, *San Xavier Development Authority,* involved an entirely different statutory scheme and, therefore, is not binding authority as to APA claims under IGRA.

Interior approved California's gaming compacts with the Indian tribes and it is this decision that is the subject of the plaintiffs' APA claim. (Complaint at ¶ 72) ("The approval of the Tribal-State Compacts by the Federal Defendants' predecessors violates IGRA."). Therefore, because the plaintiffs seek review of agency action, as opposed to a discretionary decision to forego enforcement of a statute, neither *Chaney* nor § 701(a)(2) bars review of the plaintiffs' claims. *See Robbins*, 780 F.2d at 45 ("Th[e] requirement of an amplified level of discernible standards controlling the agency's discretion is not applied, however, where agency action not analogous to enforcement decisions is involved.").

The federal defendants also present an argument that is a variation on the traditional objection to judicial review under *Chaney*. The argument is somewhat confusing but seems to go something like this: Because tribes with a compact are not parties to this lawsuit and are not bound by what the court decides, a ruling that the federal defendants' decision to approve the compacts was contrary to law could only be implemented at this point through the discretionary decision of the NIGC to enforce IGRA. (Fed. Defs.' Motion at 37-39). As a matter of APA law, this argument misses the mark because the plaintiffs do not currently seek judicial review of a decision to forego enforcement. Further, the court should not reject the plaintiffs' APA claims based on the assumption that a federal agency might not enforce the law in some future proceeding. *See supra* pp. 1107-09.

What the federal defendants style as an invocation of the "committed to agency discretion" provision of § 701(a)(2) really amounts to a contention that the plaintiffs lack Article III standing because redressability depends on the discretionary enforcement decisions of a third party and these decisions are not themselves the subject of review under the APA.

The Supreme Court considered, and rejected, a similar argument in *Federal Election Comm'n v. Akins* 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998). In *Akins,* the plaintiffs were voters who challenged the FEC's conclusion that under the Federal Election Campaign Act of 1971, 2 U.S.C. § 431, the American-Israel Political Action Committee ("AIPAC") was not a "political committee." A contrary determination would have given rise to various recordkeeping and disclosure requirements. The FEC argued that plaintiffs could not establish redressability because even if the Supreme Court reversed its decision, the FEC could still exercise its discretion and decline to pursue an enforcement action against AIPAC. Rejecting this argument the Court held that there was standing, because

> those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground. If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's decision and remand the case--even though the agency ... might later, in the exercise of its lawful discretion, reach the same result for a different reason.[62]

*Id.* at 24, 118 S.Ct. 1777.

The Court's reasoning in *Akins* is equally applicable here. A decision that the Secretary of the Interior's approval of California's gaming compacts was contrary to law might result in continued class III gaming on Indian lands that can

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[62] Although these statements were made specifically in the context of the causation requirement, the Court applied the identical analysis to the redressability question. *Akins,* 524 U.S. at 25, 118 S.Ct. 1777 ("[f]or similar reasons, the courts in this case can 'redress' 'injury in fact' ").

only be stopped by the NIGC, an agency under the purview of the Secretary of the Interior. 25 U.S.C. § 2704. Under *Chaney,* the court might be precluded from reviewing a decision of the NIGC to refuse to take steps under IGRA against illegal tribal gaming. However, even were this the case, this future contingency does not destroy redressability for the plaintiffs' claim against the Secretary's approval of gaming compacts. Indeed, *Akins* demonstrates that "[r]edressability does not require a plaintiff to establish that the defendant agency will actually exercise its discretion in any particular fashion in the future." *West Virginia Highlands Conservancy v. Norton,* 137 F.Supp.2d 687, 698 (S.D.W.Va.2001); *see also Animal Legal Defense Fund, Inc. v. Glickman,* 154 F.3d 426 (D.C.Cir.1998) ("The Supreme Court's recent decision in *FEC v. Akins,* moreover, rejects the possible counter argument that the redressability element of constitutional standing requires a plaintiff to establish that the defendant agency will actually enforce any new binding regulations against the regulated third party."). For these reasons, *Chaney* and § 701(a)(2) do not apply here to foreclose judicial review of the federal defendants' actions.

C. *Section 702-Zone of Interest Test*

Section 702 of the APA states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The Supreme Court has interpreted § 702 "to impose a prudential standing requirement in addition to the requirement, imposed by Article III of the Constitution, that a plaintiff have suffered a sufficient injury in fact." *National Credit Union Administration v. First National Bank & Trust Co.,* 522 U.S. 479, 488, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998)("*National Credit Union* "). To demonstrate standing under the APA, a plaintiff "must ... show that the interests it

seeks to protect are 'arguably within the zone of interests to be protected' by the statute in question." *Yesler Terrace Cmty. Council v. Cisneros,* 37 F.3d 442, 445 (9th Cir.1994) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)("*Data Processing* ")).

The Court has indicated that there is no "clear rule for determining when a plaintiff" falls within the zone of interests to be protected by a statute. "[I]n applying the ... test ... we first discern the interests 'arguably ... to be protected' by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them." *National Credit Union,* 522 U.S. at 488, 492, 118 S.Ct. 927. However, "[t]he test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Securities Indus. Ass'n,* 479 U.S. 388, 399- 400, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). Rather, "APA plaintiffs need only show that their interests fall within the 'general policy' of the underlying statute, such that interpretations of the statute's provisions or scope could directly affect them." *Graham,* 149 F.3d at 1004.

The plaintiffs' interests here are not so "marginally related to or inconsistent with the purposes implicit in the statute" that they lack prudential standing. *Clarke,* 479 U.S. at 399, 107 S.Ct. 750. The provision of IGRA in question, 25 U.S.C. § 2710(d)(1)(B), states that class III gaming activities are only lawful on Indian lands if such activities are "located in a State that permits such gaming for any purpose by any person, organization, or entity." Interpretation of this statutory language could directly affect plaintiffs' interests because, if plaintiffs' interpretation is correct, either the challenged compacts are invalid or plaintiffs must also be permitted to offer class III gaming.

Either outcome directly affects their interests.

Moreover, by requiring that some gaming be permitted by the state as a precondition for a class III tribal gaming compact, § 2710(d)(1)(B), as interpreted by plaintiffs, arguably manifests a desire to foster some degree of competition, and plaintiffs are among the tribes' competitors.[63] The Court has repeatedly held that competitors fall within the zone of interests of provisions that are concerned with competition.[64] *See Data Processing,*

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[63] Although the zone of interests test may implicate the court's decision on the merits, it is important to remember that the two are distinct. *See Von Aulock v. Smith,* 720 F.2d 176, 185 (D.C.Cir.1983) ( "some inquiry into the merits is necessary in a variety of situations presenting justiciability questions--those involving, for example, the 'zone of interests' test for standing"). The court's finding that the plaintiffs fall within the zone of interests "arguably" sought to be protected by IGRA does not mean that the plaintiffs must also prevail on "the argument" over statutory interpretation; "were that so, the zone of interests test would not merely implicate but would duplicate the merits." *National Coal Ass'n v. Hodel,* 825 F.2d 523, 527 (D.C.Cir.1987) (trade associations had standing to challenge restrictions on coal leasing under Mineral Leasing Act and whether Secretary of Interior considered competition; restrictions on leasing permissible and Secretary's consideration of competition adequate). *See, e.g., Clarke v. Securities Industry Ass'n,* 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) (finding standing but rejecting claim on the merits). The zone of interest test merely determines if the plaintiff is entitled to seek relief under the APA. Therefore, although the plaintiffs have an interest in competition that is arguably protected by IGRA and that permits them to bring a claim under the APA, this does not mean that they necessarily prevail on the merits. In fact, they do not, although their claim is at least colorable.

[64] The federal defendants argue that *Air Courier Conference v. American Postal Workers,* 498 U.S. 517, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991), demonstrates that competitors lack prudential standing under the APA. (Fed. Defs.' Reply at 25-26). In that case, the Court held that the interest of postal workers in maximizing their employment opportunities was not within the zone of interests to be protected by the postal monopoly statutes. *Id.* at 519, 111 S.Ct. 913. However, as the Court explained in *National Credit Union,* the statute challenged in *Air Courier Conference*

397 U.S. 150, 90 S.Ct. 827; *Arnold Tours, Inc. v. Camp,* 400 U.S. 45, 91 S.Ct. 158, 27 L.Ed.2d 179 (1970)(per curiam); *Investment Co. Inst. v. Camp,* 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971); *Clarke,* 479 U.S. 388, 107 S.Ct. 750; *National Credit Union,* 522 U.S. 479, 118 S.Ct. 927, 140 L.Ed.2d 1.

In sum, it is at least arguable that the plaintiffs are among the competitors protected by the language of § 2710(d)(1)(B). Accordingly, they have standing under the APA to challenge the Secretary's action.

V. Failure to Join Indian Tribes as Indispensable Parties

The final argument on the court's jurisdiction comes from amicus curiae California Nations Indian Gaming Association ("CNIGA"). CNIGA argues that the complaint must be dismissed in its entirety because the plaintiffs failed to join California's sixty-one Indian tribes who are necessary and indispensable parties under Fed.R.Civ.P. 19. A two part test applies to motions to dismiss for failure to join necessary and indispensable parties. *Washington v. Daley,* 173 F.3d 1158, 1167 (9th Cir.1999). First, the court must decide if the tribes are necessary to the suit. If the tribes are necessary, and if they cannot be joined, the court must determine if they are " 'indispensable' so that in 'equity and good conscience' the suit should be dismissed. The inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application. The moving party has the burden of persuasion in arguing for dismissal." *Makah Indian Tribe v. Verity,* 910

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had exclusive purposes: to increase postal revenues and to ensure that postal services were provided in a manner consistent with the public interest. *National Credit Union,* 522 U.S. at 498, 118 S.Ct. 927. Because the Act's purposes were exclusive, the postal employees' claims could not fall within the zone of interests protected by the statute. *Id.* This essential aspect of *Air Courier Conference* is missing here.

F.2d 555, 558 (9th Cir.1990) (citations omitted). Because the tribes' interests are adequately represented by the Secretary, the court denies the motion to dismiss under Rule 19.

First, an absent party is necessary if complete relief is not possible among those already parties to the suit, or if the absent party has a "nonfrivolous claim" to a legally protected interest in the suit. *Shermoen v. United States,* 982 F.2d 1312, 1317 (9th Cir.1992); Fed.R.Civ.P. 19(a)(1), (2). The Ninth Circuit has repeatedly held that "a district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement." *Clinton v. Babbitt,* 180 F.3d 1081, 1088 (9th Cir.1999) (as party to agreement with United States, complete relief impossible without Hopi Tribe); *see also Manybeads v. United States,* 209 F.3d 1164, 1165 (9th Cir.2000) (same). With respect to the current compacts, the tribes have legal interests at stake in the litigation since they will lose their compact rights to conduct class III gaming if the plaintiffs prevail. *See Washington v. Daley,* 173 F.3d at 1167 (holding that Indian tribes were necessary parties in challenge to regulation promulgated by Secretary of Commerce that increased tribes' fishing quota because adverse ruling would terminate tribes' fishing rights).

However, although the tribes can claim a legal interest in this lawsuit, they are not necessary parties because their legal interest can be adequately represented by the Secretary. (*Id.*) ("As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit."). An existing party may adequately represent the interests of an absent party if (1) the present party will undoubtedly make all of the absent party's arguments, (2) the present party is capable and willing to

make the absent party's arguments, and (3) the absent party would not offer any necessary elements that the present parties would neglect. *Shermoen,* 982 F.2d at 1318. In general, the United States' trust obligations to the Indian tribes, which the Secretary has a statutory duty to protect, 25 U.S.C. § 2710(d)(8)(B)(Secretary may disapprove compact if it violates trust obligations of the United States to Indians), *United States v. Eberhardt,* 789 F.2d 1354, 1360 (9th Cir.1986) ("We hold that the general trust statutes in Title 25 do furnish Interior with broad authority to supervise and manage Indian affairs and property commensurate with the trust obligations of the United States."), satisfies the representation criteria and allows it to adequately represent the absent tribes "unless there exists a conflict of interest between the United States and the tribe." *Southwest Ctr. for Biological Diversity v. Babbitt,* 150 F.3d 1152, 1154 (9th Cir.1998). However, for a conflict of interest to preclude a tribe's representation by the Secretary, there must be a "clear potential for inconsistency between the Secretary's obligations to the Tribes and its [other] obligations" that arises "in the context of th[e pending] case." *Washington v. Daley,* 173 F.3d at 1168-69 (holding that United States could adequately represent tribes' interests because there was no direct conflict between tribes and the United States, or between the tribes themselves).

Amicus curiae CNIGA has not carried its burden of demonstrating an actual conflict of interest in the pending litigation that would prevent the United States from adequately representing California's Indian tribes.[65] "In fact, the Secretary and the Tribes have virtually identical interests

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[65] Although a novel argument, the Model Rules of Professional Conduct are not relevant to determining whether an existing party's interests conflict with an absent party's interests. *See* CNIGA Amicus Brief at 12-13. No court has adopted this approach to determining the adequacy of representation under Fed.R.Civ.P. 19.

in this regard." *Id.* at 1167-68. The Secretary and California's Tribes agree on the central issue at hand: Exclusive class III gaming compacts for Indian tribes are consistent with IGRA and the Equal Protection Clause. Indeed, even the Indian tribes that have not yet signed class III gaming compacts agree with the Secretary's position in this regard.[66] Thus, CNIGA has "failed to demonstrate how ... a conflict might actually arise in the context of this case." *Id.* at 1168.

Likewise, CNIGA has not demonstrated that any of the remaining alleged conflicts are likely to arise in the context of this case. Most relate to the United States' exclusive jurisdiction to enforce gaming laws under 18 U.S.C. § 1166. CNIGA, however, fails to explain how pending or past enforcement actions would prevent the Secretary from adequately representing the tribes in a case that does not even remotely bear on the United States' enforcement power. *See Southwest Center for Biological Diversity,* 150 F.3d at 1154 (reversing district court's decision that United States could not represent tribes due to potential conflict noting that court identified "no argument the United States would not or could not make on the Community's behalf"). Moreover, CNIGA's position supports the improbable conclusion that § 1166 prevents the United States from ever representing tribes in IGRA cases. *See Washington v. Daley,* 173 F.3d at 1168 (United States could represent Indian tribes notwithstanding its enforcement role under the Fishery Conservation and Management Act, 16 U.S.C. §§ 1858-1860).

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[66] Similarly, the Secretary can represent the tribes who are parties to *In re Indian Gaming Related Cases,* 147 F.Supp.2d 1011 (N.D.Cal.2001), because they do not challenge the ability of tribes to exercise exclusive class III gaming rights. Further, the plaintiffs also lack standing to challenge the assessment provisions that are at issue in that case. *See infra* pp. 1131-32. Thus, any potential for conflict between the tribes and the Secretary on this score will not ripen into an actual conflict.

CNIGA's final argument is equally unpersuasive. It contends that the United States agreed that the BIA would cease its acquisition of the San Pablo land in trust for the Lytton Band without an injunction and thereby gained more time to brief this case by trading the Lytton Band's statutory rights to have the BIA proceed unless enjoined. However, CNIGA overlooks that this "strategy" was adopted to better represent the position of the tribes, including the Lytton Band. In any event, future compacts are not part of this case given the court's ruling on standing.

For these reasons, the court finds that CNIGA failed to carry its burden of demonstrating that California's Indian tribes are necessary and indispensable parties.[67]

## VI. IGRA[68]

This case presents a novel issue of statutory interpretation. Section 2710(d)(1)(B) allows for class III tribal gaming only if "located in a State that permits such gaming for any purpose by any person, organization, or entity." The issue here is whether, for purposes of IGRA, a state constitutional amendment may "permit" Indian tribes to engage in otherwise prohibited forms of class III gaming,

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[67] Because the court finds that the tribes are not necessary parties, it does not consider whether they are indispensable parties under Fed.R.Civ.P. 19(b). *See Washington v. Daley,* 173 F.3d at 1169 ("indispensable" analysis unnecessary after determining that absent party is not necessary).

[68] It is unnecessary to address the state defendants' argument that the plaintiffs lack a private right of action to enforce IGRA because their claims are brought under § 1983 and the APA. *See, e.g., Hein v. Capitan Grande Band of Diegueno Mission Indians,* 201 F.3d 1256, 1260-61 (9th Cir.2000); *State of Florida v. Seminole Tribe,* 181 F.3d 1237, 1245-50 (11th Cir.1999).

notwithstanding exclusive federal jurisdiction over Indian gaming; and, if so, whether a resulting class III gaming monopoly by tribes with compacts comports with IGRA's "any person, organization, or entity" requirement? Employing the traditional tools of statutory construction--the statute's plain language governs unless it is ambiguous, legislative history should only be consulted if the plain language is ambiguous or renders a tortured reading of the statute, and statutes benefitting Indian tribes are construed liberally in their favor--and in deference to the Secretary's interpretation, the court finds that under Proposition 1A, California lawfully permitted tribes with compacts to offer class III gaming, and that the compacts do not violate IGRA's "any person, organization, or entity" provision. *Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250, 1257 (9th Cir.1994) (applying traditional canons of statutory interpretation to IGRA).

A. *Does California "Permit" Class III Gaming?*

Proposition 1A authorizes the Governor to enter into class III gaming compacts with Indian tribes "in accordance with federal law." Plaintiffs argue that California may not rely on Proposition 1A to "permit" tribes to offer class III gaming because states only acquire jurisdiction over gambling on Indian lands after executing a valid compact under IGRA. (Pls.' Motion at 23-24; Pls.' Reply at 9). According to plaintiffs, this logical conundrum deprives Proposition 1A of "permission" status under § 2710(d)(1)(B) of IGRA. Although not without force, for several reasons, the court is not persuaded by this argument.

To begin with, Proposition 1A unambiguously authorizes the Governor and the State Legislature to conclude class III gaming compacts with Indian tribes subject to the terms of federal law, notwithstanding contrary provisions of state law

which generally prohibit such gaming. Proposition 1A explicitly excepts Indian gaming from provisions of state law that otherwise prohibits slot machines, lottery games, and banking card games. And it authorizes compacts and gaming under these compacts against the backdrop of, or by incorporating, federal law, specifically, IGRA. In this sense, Proposition 1A permits tribal gaming under IGRA. Of course, outside of the context of IGRA, California cannot unilaterally legalize tribal gaming. The issue here, however, is whether it may, for purposes of § 2710(d)(1), "permit" such gaming within the general context of IGRA. This is a question of statutory construction.

A state's affirmative permission to tribes to engage in gaming within the structure of IGRA may not have been on the forefront of what Congress had in mind in enacting IGRA and § 2710(d)(1)(B). But it is a kind of permission that is not foreclosed by the language of IGRA, and fits well within its plain language. In enacting IGRA, Congress employed capacious language to clarify the situations in which it would be lawful for Indian tribes to offer class III gaming. Section 2710(d)(1)(B) reflects this approach. It states that class III gaming activities are lawful on Indian lands only if the activities are "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). As discussed in the next section, the "any purpose" "any person" language suggests that this prerequisite is easily met. *See infra* pp. 1122-23. The Act does not define "permits"; neither placing restrictions on the word nor otherwise limiting its meaning. Section 2710(d)(1)(B) does not say "permits such gaming *independently of IGRA* for any purpose by any person, organization, or entity." It does not say "permits such gaming for any purpose by any person, organization, or entity *other than Indian* tribes." And it is precisely because Congress did not write the Act in either of these ways that

California, subject to the Secretary's approval, may "permit" class III gaming within the structure of IGRA, even though the permission is not entirely independent of IGRA, and even though IGRA prevents states from unilaterally legalizing tribal gaming. In short, the statute is written broadly, and it is consistent with the co-operative federalism at the heart of IGRA to allow the state to "permit" tribal gaming under the Act by exempting the tribes from state prohibitions on banked gaming and slot machines.[69]

Plaintiffs argue that this construction negates the state permission requirement of § 2710(d)(1)(B) because a state that satisfies the compact requirement, § 2710(d)(1)(C), would also be one that "permits such gaming." *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana,* 472 U.S. 237, 249, 105 S.Ct. 2587, 86 L.Ed.2d 168 (1985) (noting " 'the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative' ") (quoting *Colautti v. Franklin,* 439 U.S. 379, 392, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979)). Two courts have held that a compact entered into under § 2710(d)(1)(C), does not satisfy the state permission requirement of § 2710(d)(1)(B). *Citizen Band Potawatomi Indian Tribe v. Green,* 995 F.2d 179, 181 (10th Cir.1993); *American Greyhound Racing,* 146 F.Supp.2d 1012, 1067-69 (D.Ariz.2001).

However, unlike in *Green* and *American Greyhound Racing,* California does not rely on the compacts themselves for the purpose of permitting class III gaming. Separate

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[69] Furthermore, this interpretation of "permit" is consistent with the Ninth Circuit's construction of the term, as employed in IGRA, to mean " '[t]o suffer, allow, consent, let; to give leave or license; to acquiesce by failure to prevent, or to expressly assent or agree to the doing of an act.' " *Rumsey,* 64 F.3d at 1257 (quoting from Black's Law Dictionary). Here, by constitutional amendment, California "permits" class III gaming through the compacting procedure as set forth in IGRA.

from the compacts, by constitutional amendment, California specifically exempted Indian tribes from the State's general gambling prohibitions, and granted them permission. Although the vehicle for California's exemption, Proposition 1A, integrates and depends on the successful conclusion of gaming compacts, Proposition 1A is still distinct from the compacts. For all of these reasons, and in deference to the Secretary's interpretation, *see infra* pp. 1126-27, the court finds that by Proposition 1A, California "permits" class III gaming as required by IGRA.

B. *Any Person, Organization, or Entity*

Plaintiffs further contend that because California only permits Indian tribes to offer class III gaming activities, it is not a state that "permits such gaming for any purpose by any person, organization, or entity." (Pls.' Motion at 18). 25 U.S.C. § 2710(d)(1)(B). According to the plaintiffs' interpretation of § 2710(d)(1)(B), a state cannot satisfy the "any person, organization, or entity" requirement unless the state "permits such gaming for non-Indians." (Pls.' Motion at 22). Plaintiffs interpret "any" as "every," as opposed to "any one." This argument fails for several reasons.

To begin with, as already noted, the statute's plain language does not support the plaintiffs' reading of the "any person, organization, or entity" requirement. Congress did not say that a state had to permit class III gaming activities for any *non-Indian* purpose for any *non-Indian* person, organization, or entity. Instead, as with the word "permits," Congress structured the requirement to provide states and tribes with maximum flexibility to fashion a class III gaming compact.

The failure of the plaintiffs' argument is evident in Congress' use of "any" as a modifier for the class III gaming that a state must permit before a tribe may enter into a compact. The word "any" can mean "every" or "one." However, interpreting "any" in § 2710(d)(1)(B) to mean "every" must be rejected. If IGRA required that a tribe could only enter a compact if located in a state that permitted such activities for every purpose by every person, organization, or entity, no tribe would be allowed to enter into a class III gaming compact because all states impose at least some limits on who can offer gaming and for what purpose. Therefore, § 2710(d)(1)(B) is best understood as allowing class III gaming compacts in states that permit that kind of

gaming for at least one purpose, by at least one person, organization, or entity. Because California permits class III gaming by tribes with compacts under Proposition 1A, the State also satisfies § 2710(d)(1)(B)'s "any purpose by any person, organization, or entity" requirement. *See American Greyhound Racing,* 146 F.Supp.2d at 1067 ("[t]he State must first legalize a game, even if only for tribes, before it can become a compact term").

Finally, plaintiffs contend that this issue is governed by the Ninth Circuit's ruling in *Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250 (9th Cir.1994). In *Rumsey,* the court observed that "a state need only allow Indian Tribes to operate games that others can operate, but need not give tribes what others cannot have." *Id.* at 1258. *Rumsey* settled the question of whether a state must negotiate class III gaming compacts with Indian tribes when the state does not permit those activities for anyone.[70] The decision does not address the issue presented here-- whether the state may negotiate class III gaming compacts with Indian tribes even if the state does not permit those activities for non-Indians. Plaintiffs' argument that this "is a distinction without a difference," simply restates their position that a state may not affirmatively permit Indian tribes to engage in class III gaming without opening up such gaming to everyone else. Neither the "any person, organization, or entity" requirement nor *Rumsey* supports the plaintiffs' position.

In short, the court concurs with the Secretary that the exclusive class III gaming compacts, as permitted by

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[70] *Rumsey* also held that "IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. Instead, the statute says only that, if a state allows a gaming activity 'for any purpose by any person, organization, or entity,' then it also must allow Indian tribes to engage in that same activity." *Rumsey,* 64 F.3d at 1258.

Proposition 1A, are within the plain language of IGRA.

C. *Legislative History*

IGRA's plain language might obviate the need to rely on legislative history. But to the extent that the language of § 2710(d)(1)(B) might be ambiguous, a review of the legislative history tends to support the Secretary's construction of IGRA. *See Wilshire Westwood Assoc. v. Atlantic Richfield Corp.*, 881 F.2d 801, 805 (9th Cir.1989) (noting that plain meaning of statute rendered legislative history unnecessary but that legislative history supported plain meaning construction). The legislative history is silent on the precise dispute here concerning the construction of § 2710(d)(1)(B). But it does suggest that Congress had three overriding purposes concerning the relationship between the tribes and the states: (1) provide the state with regulatory authority over class III gaming through the compact procedure; (2) permit the states and tribes a considerable degree of flexibility in negotiating the terms on which class III gaming would occur; and (3) ensure the tribes that the states would not bar class III gaming on Indian land, while at the same time permitting others to engage in such gaming elsewhere in the state. The Secretary's interpretation of § 2710(d)(1)(B), which would allow to California the flexibility to permit class III gaming only on Indian lands, is consistent with these three purposes.

In the five years before IGRA was passed, at least six bills were introduced in Congress for the purpose of regulating Indian gaming and a similar number of hearings were held. By 1987, however, only two such bills were under serious consideration. S. 555, 100th Cong. (1987) and S. 1303, 100th Cong. (1987).[71] Both bills incorporated the

[71] S. 1303 was identical to H.R. 2507, 100th Cong. (1987). S. 555 was based on H.R.1920, 99th Cong. (1985).

"class" approach to regulating Indian gaming present in the final version of IGRA. The primary difference between the two bills was in how they regulated gaming. Under S. 555, a tribe seeking to engage in class III gaming would cede jurisdiction to the state in which its lands were located and the state would then assume primary regulatory responsibility. The bill provided that an Indian tribe could offer a class III gaming activity

> otherwise legal within the State where such lands are located ... where the Indian tribe requests the Secretary [of the Interior] to consent to the transfer of all civil and criminal jurisdiction ... pertaining to the licensing and regulation of gaming over the proposed gaming enterprise to the State within which such gaming enterprise is to be located and the Secretary so consents.

S. 555, 100th Cong. § 11(d)(2)(A).

In contrast, under S. 1303, the federal government would have assumed responsibility for regulating class III gaming, "where such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity." S. 1303, 100th Cong. § 10(b). In order to offer class III gaming, S. 1303 required tribes to adopt a class III ordinance which had to be approved by the Chairman of the National Indian Gaming Commission. After approving a tribe's class III gaming ordinance, the Chairman would "adopt a comprehensive regulatory scheme for such gaming activity ... after consultation with the affected Indian tribe or tribes and with the appropriate officials of the State." *Id.* § 12(e)(1). Further, S. 1303 specified that "[t]he regulations adopted pursuant to this subsection shall be identical to those provided for the same activity by the State within which such Indian gaming

activity is to be conducted which is applicable to a State licensee subsequent to the issuance of such license." *Id.* § 12(e)(2).

Both S. 555 and S. 1303 met with considerable opposition. States which "[h]istorically ... had the primary responsibility for establishing and enforcing public policies regarding liquor and gambling because these matters have such a particularly localized impact," did not want to cede jurisdiction to regulate tribal gaming within their borders and therefore opposed S. 1303. *Gaming Activities on Indian Lands and Reservations: Hearing Before the Senate Select Comm. on Indian Affairs on S. 555 to Regulate Gaming on Indian Lands and S. 1303 to Establish Federal Standards and Regulations for the Conduct of Gaming Activities on Indian Reservations and Lands, For Other Purposes,* 100th Cong. 510 (1987) (letter of John Van de Kamp, Attorney General, State of California)(hereinafter "*Hearings on S. 555 and S. 1303* "). States feared that the federal government might permit tribes to offer forms of gambling otherwise prohibited under state law and opposed by the state, opening the door "for the tribes on the reservation to become an island" where state law would not apply and could not reach. *Id.* at 80 (statement of Sen. John Melcher, Member, Senate Select Comm. on Indian Affairs). For their part, most Indian tribes opposed S. 555 because it gave the states such extensive regulatory authority.[72]

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[72] Most tribes actually opposed both bills and believed that any regulation of tribal gaming was "a gross infringement upon tribal sovereignty." *Hearings on S. 555 and S. 1303,* at 496 (letter of Edgar Bowen, Tribal Chief/Chairman, Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians); *see also id.* at 497-99 (letter of Wendell Chino, President, Mescalero Apache Tribe); *id.* at 500-01 (letter of Joseph Ely, Tribal Chairman, Pyramid Lake Paiute Tribal Council); *id.* at 502 (letter of John Hair, Chief, United Keetoowah Band of Cherokee Indians in Oklahoma); *id.* at 508 (letter of Mark Perrault, Chairman, Keweenaw Bay Indian Community); S.Rep. No. 100-446, at 4 (1988),

Faced with a deadlock over whether the states or the federal government would have jurisdiction to regulate class III gaming by Indian tribes, Congress inserted the compact provision into the final version of S. 555. *See* 134 Cong. Rec. H8146-01 (daily ed. September 26, 1988) (statement of Rep. Udall) (noting that Congress had been unable to reach earlier compromise due to "conflict between the right of tribal self-government and the desire for State jurisdiction over gaming activity on Indian lands"). The Senate Committee Report that accompanied passage of IGRA explains the role of the compacts in balancing the interests of the states and the tribes:

> After lengthy hearings, negotiations, and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises.... The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few

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*reprinted in* 1988 U.S.C.C.A.N. 3071, 3074 ("Tribes generally opposed any effort by the Congress to unilaterally confer jurisdiction over gaming activities on Indian lands to States and voiced a preference for an outright ban of class III games to any direct grant of jurisdiction to States."). Tribes that expressed a preference were strongly opposed to state jurisdiction. *See Hearings on S. 555 and S. 1303,* at 104 (Statement of Hon. William Houle, Chairman, Fond du Lac Band of Lake Superior Chippewas and Chairman, National Indian Gaming Association) ("National Indian Gaming Association only supports legislation, however, that does not transfer any jurisdiction to State government over Indian people, their activities, or their lands."); *id.* at 107 (Statement of Herman Agoyo, Chairman, All Indian Pueblo Council) ("Although we support Federal legislation to regulate Indian controlled gaming, we do not and will not support State jurisdiction.")

> exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a viable mechanism for settling various matters between two equal sovereigns.

S.Rep. No. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083. Therefore, by giving the states a primary role in the regulatory oversight of tribal gaming, while at the same time permitting tribes to sue states that refused to enter into negotiations for class III gaming compacts, the compact provision sought to satisfy both the states' desire to regulate and the tribes' concern that state regulation under S. 555 might preclude all tribal gaming. *See* S.Rep. No. 100-446, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084 ("[T]he issue before the Committee was how best to encourage States to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated and chose to apply the good faith standard as the legal barometer for the State's dealings with tribes.").

As to the language in § 2710(d)(1)(B) at issue here, the legislative history is silent. There is no explicit discussion of the "permit" or "any person" formulation in the committee hearings or reports. Perhaps the most direct inference may be drawn from Congress' decision to include the current formulation of § 2710(d)(1)(B) which comes from S. 1303, even though S. 555 was the basis for most of the final version of IGRA. The comparable provision in S. 555 permitted class III tribal gaming where "otherwise legal within the State where such lands are located." This formulation would seem to block a state from permitting

*tribal gaming while otherwise* prohibiting gaming by others. But this language was not carried over into IGRA, perhaps suggesting that Congress did not intend to so limit the states or the tribes.[73]

It is fair to conclude from the legislative history that Congress was not concerned about the situation in which a state and the tribes together affirmatively sought to foster exclusive class III gaming on tribal lands. This was not the context in which Congress acted; rather, Congress faced a situation in which the states were insisting on their right to control or prohibit and the tribes were insisting on their right to be free from state regulation. While IGRA's legislative history does not suggest that Congress specifically contemplated a State's support of a monopoly for tribal gaming, Proposition 1A and the compacts here are nevertheless consistent with the overarching concerns that led to the IGRA compromise: The State gains flexible regulatory authority while class III gaming by the tribes is protected from discrimination by the State.

Further, California's decision to "permit" tribes to operate class III gaming facilities within the context of IGRA and the compacts, while denying those rights to other persons, organizations, and entities, is a policy judgment, which whether one agrees with it or not, does not conflict with IGRA's goal of maintaining state authority while protecting

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[73] Plaintiffs attempt to put the best face on IGRA's adoption of the "permits such gaming for any purpose to any person" language from S. 1303 rather than the "otherwise legal" language of S. 555. Plaintiffs argue that because the state permission language originated in S. 1303, which provided for exclusive federal regulation of class III gaming and which lacked the State-Tribal compact procedure, it must have referred only to gambling that was permitted on non-Indian land. But the language was taken from S. 1303 and substituted into S. 505 which did not provide for exclusive federal regulation.

Indian gaming from discrimination. By contrast, to interpret IGRA to require the states to chose between no class III gaming anywhere and class III gaming everywhere would not further any of IGRA's goals and would limit the states' authority and flexibility without any resulting benefit to the tribes.

Finally, passing references in the legislative history to achieving "a fair balancing of competitive economic interests" and to developing a uniform "regulatory and jurisdictional pattern" provide little support to plaintiffs' position. Congress' expressed concern about competition was to ensure that the tribes, not other parties, could compete with any group operating under a state gambling license. *See* S.Rep. No. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 ("It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State- licensed gaming enterprises from free market competition with Indian tribes."). Further, the discussion of consistent regulation was simply part of Congress' goal of extending state regulatory authority to Indian lands so that these lands would not become islands free from state oversight.[74]

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[74] There are several flaws in plaintiffs' argument that § 2710(d)(1)(B) precludes California from granting tribes exclusive class III gaming rights because Congress intended that such gaming would only take place in states with a history of regulating similar activities. (Pls.' Motion at 30-33). When Congress drafted IGRA, it did not restrict class III gaming to states with such experience. Because it could lead to the untenable result in which states without this regulatory experience would be precluded from simultaneously granting gaming rights to Indians and non- Indians alike, such an interpretation of § 2710(d)(1)(B) is contrary to Congress' interest in preserving state sovereignty and providing tribes with an opportunity to develop gaming operations. Furthermore, Congress recognized that not every state compact would confer exclusive authority to regulate class III gaming on preexisting state regulatory bodies. *See* S.Rep. No. 100-446, at 13-14 (1988), *reprinted in* 1988

D. *Deference to the Secretary's Interpretation*

In interpreting IGRA the court has given substantial deference to the Secretary's understanding of IGRA as expressed in her approval of the compacts. This deference is appropriate under *Chevron U.S.A. v. Natural Res. Def. Council,* 467 U.S. 837, 842-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). First, there is no explicit direction from Congress as to whether a state may "permit" tribal gaming within the context of IGRA, or whether a resulting class III gaming monopoly violates IGRA. *Id.* at 843, 104 S.Ct. 2778. Congress was understandably not focused on the situation in which the states and tribes agreed to exclusive class III Indian gaming rights. *Yang v. I.N.S.,* 79 F.3d 932, 935 (9th Cir.1996) (applying traditional methods of statutory interpretation to determine if Congress spoke to an issue under *Chevron* step one). Therefore, because "Congress has left a gap for the administrative agency to fill, [the court] proceed[s] to step two" of *Chevron. Zimmerman v. Oregon Dep't of Justice,* 170 F.3d 1169, 1173 (9th Cir.1999).

Second, for the reasons already stated, the Secretary's interpretation of IGRA is reasonable. *Chevron,* 467 U.S. at 843, 104 S.Ct. 2778. The Secretary's interpretation is consistent with the statute's language and it complements IGRA's legislative history by balancing state and tribal sovereignty and interests. Moreover, although the Ninth Circuit gives priority to *Chevron* over the rule of interpretation that statutes enacted for the benefit of Indian tribes should "be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," the two doctrines here point to the same outcome. *Navajo Nation v. Dep't of Health and Human Serv.,* 285 F.3d 864,

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U.S.C.C.A.N. 3071, 3083-84.

870 (9th Cir.2002) (quoting *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985)); *Williams v. Babbitt,* 115 F.3d 657, 663 n. 5 (9th Cir.1997).

Also, although the Secretary's interpretation came in the form of a letter, and subsequent publication of approval in the Federal Register, *Chevron* deference still applies because the Secretary's letter "was not an 'opinion letter,' but, rather, a final, albeit informal, adjudication on the merits." *Navajo Nation,* 285 F.3d at 871. Indeed, as in *Navajo Nation* where the Ninth Circuit held that a similar letter constituted an informal adjudication that warranted *Chevron* deference, "Congress delegated to the Secretary the authority to adjudicate in this manner." 25 U.S.C. § 2710(d)(8)(A), (D) (authorizing Secretary to approve compact and requiring publication of approval in Federal Register). Moreover, the Secretary's letter explained the basis for her approval and why she found that the compacts were consistent with IGRA and equal protection.[75] (*See* Letter from Kevin Gover, May 5, 2000, Exh. B to Complaint).

The Secretary is responsible for administering IGRA and reviewing class III gaming compacts, and her interpretation of the statute is entitled to a degree of deference.[76]

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[75] The Secretary's approval specifically notes that the compacts limit gaming to "the Tribes' reservation land;" that through Proposition 1A, "Californians amended their state's constitution to permit the Governor to compact with Indian tribes, subject to ratification by the State Legislature;" and that granting tribes exclusive class III gaming rights "in no way violates the equal protection provisions of the United States Constitution." (Letter from Kevin Gover, May 5, 2000, Exh. B to Complaint).

[76] Citing *Williams v. Babbitt,* 115 F.3d 657 (9th Cir.1997), plaintiffs contend that the Secretary's interpretation of IGRA should be rejected because it raises a difficult constitutional question. (Pls.' Motion at 33-34; Pls.' Reply at 16-17). However, "the 'constitutional doubt' canon

E. *Conclusion*

Although the issue is not free from doubt, because of the statutory presumption in favor of Indian tribes, the deference owed to the Secretary's interpretation, and the Act's language and legislative history, the court concludes that California's compacts with the Indian tribes do not violate IGRA.[77]

## VII. Equal Protection

The final issue is whether California's compacts, and their approval by the Secretary, violate the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.[78] Plaintiffs argue that the compacts and

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does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious." *Almendarez-Torres v. United States,* 523 U.S. 224, 239, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Rather, the rule applies "[o]nly if the agency's proffered interpretation raises *serious* constitutional concerns." *Williams,* 115 F.3d at 662 (emphasis in original). Although the Secretary's interpretation of IGRA raises a constitutional question, it is not sufficiently serious to require a different reading of the statute. Under *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), preferences in favor of Indian tribes are classified as political, not racial, and therefore are reviewed deferentially. *See infra* pp. 1127-30.

Moreover, the preference accorded to tribes differs from the preference found to raise a grave constitutional question in *Williams v. Babbitt.* The preference in *Williams* was given to Indians as individuals and applied on non-Indian lands. 115 F.3d at 664. Here the preference is given to tribes and applies only to the lands within the tribes' sovereignty. 25 U.S.C. § 2710(d)(1).

[77] The same analysis applies to the plaintiffs' claims under the Johnson Act, 15 U.S.C. § 1175. California satisfies IGRA's waiver provision of the Johnson Act, 25 U.S.C. § 2710(d)(6), *see supra* p. 1093 n. 8, because California both makes gambling devices legal through Proposition 1A and the compacts, and it has Tribal-State compacts in effect.

[78] For purposes of clarity, references to "equal protection" or the "Equal

Proposition 1A should be evaluated under the strict scrutiny standard, rather than the modest, deferential standard of review from *Morton v. Mancari,* 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). (Pls.' Motion at 35-49). Further, plaintiffs argue that even if the *Mancari* standard applies, the compacts and Proposition 1A violate equal protection because they are not rationally related to the furtherance of Congress' trust obligation to Indian tribes and to uniquely Indian interests. (*Id.* at 49-54). For the following reasons, the court concludes that *Mancari* does apply, and that the compacts are rationally related to Congress' trust obligation.

In *Morton v. Mancari,* the Supreme Court upheld a statutory hiring preference for Indians in the Bureau of Indian Affairs ("BIA"). 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). The Court noted that Indian tribes have a unique status under federal law as quasi-sovereign entities and that laws enacted on their behalf reflect political rather than racial classifications. *Id.* at 553-54, 94 S.Ct. 2474. Consequently, the Court applied a deferential standard of review and upheld the BIA hiring preference noting that it was "reasonably and directly related to a legitimate, nonracially based goal," tribal self-government. *Id.* at 554, 94 S.Ct. 2474. The Court tied its equal protection analysis to the tribes' special status and the federal government's special trust obligation: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation

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Protection Clause" encompass both plaintiffs' claim against the federal defendants under the Due Process Clause of the Fifth Amendment as well as plaintiffs' Fourteenth Amendment claim against the state defendants. *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 201, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (noting "congruence" principle: " 'Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.' ") (quoting *Buckley v. Valeo,* 424 U.S. 1, 93, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)).

toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555, 94 S.Ct. 2474.

In applying *Mancari*, the Ninth Circuit has recognized that the *Mancari* standard and Congress' trust obligations apply to interests much broader than tribal self-government including the "right of individual Indian profit-making businesses to be free from state taxation; [the] right to fish; [and] imposition of federal rather than state law on Indians committing crimes on reservations." *Alaska Chapter*, 694 F.2d at 1168 (internal citations omitted).[79]

California's compacts with the tribes are rationally related to the furtherance of Congress' unique obligation to the tribes. IGRA was enacted for the purposes of "promoting tribal economic development, self-sufficiency, and strong tribal governments" as well as shielding tribal gaming from organized crime. 25 U.S.C. § 2702(1), (2). The compacts expressly incorporate these purposes, (Compact at Preamble F ("The State has a legitimate interest in promoting the purposes of IGRA.")), and similarly state that class III gaming constitutes a way to "enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs." (Compact at 1.0(b)). Further, the compacts note that "[t]he exclusive

[79] In *Williams*, the Ninth Circuit also suggested that *Mancari* was limited to classifications "that affect uniquely Indian interests." *Williams*, 115 F.3d at 665. The court also offered the view in dicta that a monopoly on gambling accorded to Indians would not relate to unique Indian interests. Even if *Williams* ' interpretation were correct and *Mancari* is limited to "statutes that affect uniquely Indian interests," the compacts here would survive because by limiting such gaming to Indian land, they "give special treatment to Indians on Indian land." *Id.* at 665. If there is to be a more stringent "unique Indian interests" test for determining the standard of equal protection review, the development of such a test must await further guidance from the Ninth Circuit or the Supreme Court.

rights that Indian tribes in California, including the Tribe, will enjoy under this Compact create a unique opportunity for the Tribe to operate its Gaming Facility in an economic environment free of competition from ... Class III gaming ... on non- Indian lands in California." (*Id.* at Preamble E).

Therefore, the compacts, entered into under IGRA, are designed to encourage tribes to become politically and economically self-sufficient while preserving tribal sovereignty and mitigating organized crime, all of which fit within the broad mandate of the federal government's trust obligation. *See Alaska Chapter,* 694 F.2d at 1170 ("Encouraging and assisting Indian-owned businesses helps develop such leadership and furthers the government's trust obligation to help the Indians develop economic self-sufficiency."); *St. Paul Intertribal Housing Bd. v. Reynolds,* 564 F.Supp. 1408, 1413 (D.Minn.1983) (noting broad scope of federal trust obligation to Indian tribes). These objectives are "fundamental to the federal government's trust obligation with tribal Native Americans." *Peyote Way Church,* 922 F.2d at 1216.[80] Moreover, permitting tribes with compacts to exercise exclusive class III gaming rights on Indian land is rationally related to these objectives and, therefore, to the furtherance of Congress' trust obligations to the tribes. *See Bd. of Comm'rs of Creek County v. Seber,* 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 (1943) (upholding exclusive tax immunity for certain Indians). There is no dispute that by

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[80] Congress' decision to curtail tribal jurisdiction over class III gaming by making such gaming contingent on state approval is consistent with the goal of furthering tribal sovereignty. (Pls.' Reply at 33). Following *Cabazon,* individual states retained authority to ban all tribal gaming along with all other gaming. IGRA created a structure within which the interests of tribes that wished to game were balanced with the interests of states in controlling crime. Given that all tribal gaming could have been banned, it was rational for Congress to further tribal sovereignty by balancing it against the interests of the states in regulating such gaming.

permitting tribes to exercise gaming rights on Indian land free from non-tribal competition, they are provided with a valuable economic benefit. Further, it was rational for Congress to allow the states to grant a tribal preference with respect to gaming, as opposed to some other economic or entertainment activity, because at least some tribes had already been engaged in gaming operations for the purpose of raising revenue prior to enactment of IGRA.[81] 25 U.S.C. § 2701(1); *American Greyhound Racing,* 146 F.Supp.2d at 1075. For these reasons, the Secretary's approval of the compacts was rationally related to the furtherance of Congress' trust obligations and does not violate equal protection. California's negotiation and approval of the compacts, under an explicit delegation of congressional authority, is similarly within Congress' trust obligations and is consistent with equal protection.[82] *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463, 501, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979)

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[81] It is of no consequence to the equal protection analysis that tribal gaming involves substantial amounts of gaming by non-Indians. (Pls.' Reply at 34). Were *Mancari* subject to such a limitation, many tribal preferences would fail because most commerce on Indian land is inextricably tied to non-Indian persons and companies. *See Alaska Chapter,* 694 F.2d at 1170 (noting congressional findings that most income generated on Indian land flows off-reservation).

[82] For this reason, plaintiffs' reliance on *Malabed v. North Slope Borough,* 42 F.Supp.2d 927 (D.Alaska 1999) is misplaced. The tribal preference at issue in that case was not passed in response to an explicit delegation of congressional authority. *Id.* at 939 ("[North Slope Borough] has no constitutional mandate to promote Indians' interest."). Further, the preference, which favored native Alaskans, was enacted by a municipal body that was "overwhelmingly composed of Inupiat Eskimos," and therefore raised the specter of "a majority arrogat[ing] to itself special privileges and rights otherwise denied to similarly-situated members of the minority." *Id.* at 940. By contrast, having been approved by California's voters. Governor, Legislature, and the federal government, if the compacts lack for anything, it is surely not approval from the public and its elected officials.

(state action in preference of Indian tribes falls under *Mancari* when passed "under explicit authority granted by Congress").

Plaintiffs argue that strict scrutiny must apply because (1) *Mancari* was overruled in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); (2) *Mancari* 's deferential standard of review only applies to federal action while the compacts negotiated by California exceed the scope of Congress' delegation to the states; and (3) the compacts are racial classifications because they primarily benefit individual Indians. These contentions fail.

First, although there has been some comment in the case law about the impact of *Adarand* on *Mancari,* the Supreme Court did not overturn *Mancari,* and the majority opinion in *Adarand* never even mentions *Mancari* by name. *See id.* at 244, 115 S.Ct. 2097. No lower court has held that *Mancari* was overruled by *Adarand.* Therefore, until a higher court finds that *Mancari* has been overturned by the Supreme Court, it is controlling. *See Rice v. Cayetano,* 146 F.3d 1075, 1081 n. 17 (9th Cir.1998) (rev'd on other grounds *Rice v. Cayetano,* 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000)); *American Greyhound Racing,* 146 F.Supp.2d at 1077 ("In these circumstances, the court must follow *Mancari* as the directly controlling case, for the Supreme Court reserves to itself the prerogative to find its opinions implicitly overruled by changing doctrine."). Moreover, while the regulation addressed in *Adarand* extended preferences to "Native Americans," *Adarand,* 515 U.S. at 205, 115 S.Ct. 2097, both IGRA and the compacts address themselves to Indian tribes as sovereign entities. 25 U.S.C. § 2710(d)(1)(C) (noting that class III gaming requires a compact entered into by an Indian tribe); Compact at 1 (noting that compact is entered into between the State of

California and a "federally-recognized sovereign Indian tribe"). For these reasons, IGRA and the compacts here do not implicate *Adarand* 's requirement of strict scrutiny for all racial classifications.

Plaintiffs' second argument is that strict scrutiny applies because California's compacts violate IGRA and states may only avail themselves of the *Mancari* standard when they act "under explicit authority granted by Congress."[83] *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463, 501, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979). Because the compacts provide for assessments in excess of "such amounts as are necessary to defray the costs of regulating such activity," 25 U.S.C. § 2710(d)(3)(C)(iii), plaintiffs argue that California exceeded the authority delegated to the states in IGRA and, therefore, the exclusive class III gaming rights for tribes must survive strict scrutiny. (Pls.' Motion at 38-41). In essence, the plaintiffs seek to litigate the validity of the assessment provisions of the compacts within the confines of their argument about the level of scrutiny the court should apply to the question of equal protection.

This strained argument fails among other reasons

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[83] Plaintiffs also contend that strict scrutiny applies because Congress was neutral with respect to whether the states would allow tribes to offer class III gaming, and, therefore, Congress did not affirmatively direct the states to adopt a specific policy in favor of class III gaming by the tribes. (Pls.' Reply at 25-26). But Congress intended at least to facilitate tribal gaming while balancing the sovereign interests of states and tribes. Moreover, it is not the case that Congress must mandate a particular type of state action, as opposed to merely allowing it, before a state may implement a tribal classification that will be evaluated under *Mancari.* The classification upheld in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463, 473-74, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979), permitted, but did not require, certain states to assume civil and criminal jurisdiction over Indian land.

because plaintiffs lack standing to challenge the compacts' assessment requirements, even within the context of their assault on equal protection. "[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). It is the tribes which have or are seeking compacts, rather than their competitors, who are the proper parties to challenge the assessment provisions because they are the ones who are directly injured by any such violation of IGRA.[84] Nor is there any obstacle that prevents Indian tribes from litigating such claims. *See Powers v. Ohio,* 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (noting that one requirement for exercise of third party standing is that "there must exist some hindrance to the third party's ability to protect his or her own interests"). The limitation on third party standing--the Supreme Court has referred to it as a "matter[ ] of judicial self-governance"-- is no less relevant when encapsulated within an argument about the standard of review under the Equal Protection Clause. *Warth,* 422 U.S. at 500, 95 S.Ct. 2197. To the contrary, it is especially apt in this case where the focus of the litigation is on decidedly different issues and would require the court to consider a side dispute on the meaning of an entirely separate provision of IGRA. In short, the court finds that the provision of the compacts at issue here, the permission to engage in class III gaming, was based on authority delegated by the federal government. *See Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. at 501, 99 S.Ct. 740 (holding that *Mancari* applied

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[84] Even if the court were to address the merits of the plaintiffs' arguments about the assessment provisions, there is no reason to believe that a different outcome would be forthcoming than the one reached in *In re Indian Gaming Related Cases,* 147 F.Supp.2d 1011 (N.D.Cal.2001), where the district court held that the compacts' assessment provisions did not violate IGRA.

to state regulation of Indian tribes enacted in response to specific delegation of authority by Congress to the state).[85]

Finally, the equal protection analysis does not change merely because it may be that some, or even most, of the monetary benefits of class III gaming inure to individual Indians rather than the tribes. (Pls.' Reply at 22). As *Mancari* illustrates, a tribal preference is not transformed from a political to a racial classification that requires strict scrutiny merely because the vehicle for the preference consists of individual members of tribes. The BIA hiring preference upheld in *Mancari* explicitly targeted individual Indians but was still considered a political classification that merited deferential review. *Mancari,* 417 U.S. at 554, 94 S.Ct. 2474. Moreover, it cannot fairly be said that a preference which aids individual members of Indian tribes is not rationally related to Congress' trust obligation to the tribes. Individual members are benefitted not because they are Indian per se but because they are members of tribes that have entered into compacts and distributed the resulting income to their members. A contrary holding would both distort *Mancari* and hamstring the political branches in the exercise of their trust obligation to the Indian tribes.[86]

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[85] For this reason also, there is no equal protection violation under count IV which seeks to enjoin enforcement of California's Penal Code prohibitions against class III gaming by the plaintiffs. Following authority specifically delegated to it by Congress, California exempted Indian tribes from otherwise generally applicable laws prohibiting class III gaming. This benefit to Indian tribes is evaluated under *Mancari* and is consistent with the Equal Protection Clause.

[86] Plaintiffs also contend that the compacts constitute racial preferences because tribal membership depends, at least in part, on race. (Pls.' Reply at 22 n.14). Even if true, strict scrutiny does not apply under the case law. *Mancari* illustrates this point, as the BIA hiring preference only applied to persons who were "one-fourth or more degree Indian blood and ... a member of a Federally-recognized tribe." *Mancari,* 417 U.S. at 554 n. 24, 94 S.Ct. 2474; *see also Alaska Chapter,* 694 F.2d at 1168 ("If

## VIII. Conclusion

This case has presented complex and novel issues relating to federal jurisdiction, IGRA, and equal protection. The issues have been ably briefed and argued by the parties and various amici. The legal issues presented reflect the significance of the difficult public policy choices made by the Secretary, the Governor, and the State of California relating to gambling. Those choices may be wise or unwise. The grant of an economic monopoly to any group presents serious questions that should cause careful consideration and hesitation. In a strong democratic system, in which the proponents and opponents of Indian gaming, and gambling more generally, can be heard, these important questions can continue to be evaluated and debated in the light of experience and future developments. These matters of social policy are not ones for the court to resolve but are properly left for resolution by the political branches and the electorate. Where the political branches and the people of California have adopted a policy that does not violate either federal law or the United States Constitution, that policy is entitled to prevail.

For the foregoing reasons, the plaintiffs' motion with respect to IGRA, the Equal Protection Clause, and the Due Process Clause is DENIED and the motions of the state and federal defendants are GRANTED. As to standing, the state defendants' motion is GRANTED as to (1) the Governor and future compacts under count II; (2) the Commission and the Director under count II; (3) the Governor under count III; and (4) the Commission under count IV, but is DENIED as

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the preference in fact furthers Congress' special obligation, then *a fortiori* it is a political rather than racial classification, even though racial criteria might be used in defining who is an eligible Indian.").

to (1) the Governor as to the existing compacts and count II; and (2) the Attorney General and the Director under count IV. As to *Ex parte Young* and § 1983, the state defendants' motion is GRANTED as to (1) the Commission and the Director under count II; and (2) the Commission under count IV, but is DENIED as to (1) the Governor under count II; and (2) the Attorney General and the Director under count IV. With respect to the APA, the federal defendants' motion is DENIED. The motion to dismiss for failure to join necessary and indispensable parties is DENIED.

Judgment shall enter for defendants.

IT IS SO ORDERED.

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

ARTICHOKE JOE'S; CALIFORNIA GRAND CASINO; FAIRFIELD YOUTH FOUNDATION; LUCKY CHANCES, INC.; OAKS CLUB ROOM; and SACRAMENTO CONSOLIDATED CHARITIES,

*Plaintiffs-Appellants*,

v.

GALE A. NORTON, Secretary of the Interior; JAMES MCDIVITT, Acting Secretary of the Interior; ARNOLD SCHWARZENNEGER, Governor of California; BILL LOCKYER, Attorney General of California; HARLAN W. GOODSON, Director of the California Division of Gambling Control; John E. Hensley, Chair, California Gambling Control Commission; MICHAEL C. PALMER, J.K. SASAKI, and ARLO SMITH, Members of the California Gambling Control Commission,

*Defendants-Appellees*

No. 02-165-8
D.C. No.
CV-01-00248-DFL

ORDER

Before: REINHARDT and GRABER, Circuit Judges, and RHOADES,* District Judge

* The Honorable John S. Rhoades, Sr., Senior United States District Judge for the Southern District of California, sitting by designation.

Judges Reinhardt and Graber have voted to deny the petition for rehearing, and Judge Rhoades has voted to grant it. Judges Reinhardt and Graber have voted to deny the petition for rehearing en banc, and Judge Rhoades has recommended granting it.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested to vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

## PRIMARY ELECTION 2000 - PROPOSITION 1A

Official Title and Summary prepared by the Attorney General

Gambling on Tribal Lands.
Legislative Constitutional Amendment.

- Modifies state Constitution's prohibition against casinos and lotteries, to authorize Governor to negotiate compacts, subject to legislative ratification, for the operation of slot machines, lottery games, and banking and percentage card games by federally recognized Indian tribes on Indian lands in California, in accordance with federal law.
- Authorizes slot machines, lottery games, and banking and percentage card games to be conducted and operated on tribal lands subject to the compacts.

TEXT OF PROPOSITION 1A

This amendment proposed by Senate Constitutional Amendment 11 of the 1999-2000 Regular Session (Resolution Chapter 142, Statutes of 1999) expressly amends the California Constitution by amending a section thereof; therefore, existing provisions proposed to be deleted are printed in {- ~~strikeout type~~ - } and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED AMENDMENT TO SECTION 19 OF ARTICLE IV

SEC. 19. (a) The Legislature has no power to authorize lotteries, and shall prohibit the sale of lottery tickets in the state.

(b) The Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results.

(c) Notwithstanding subdivision (a) the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes.

(d) Notwithstanding subdivision (a), there is authorized the establishment of a California State Lottery.

(e) The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey.

*(f) Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.*

WEST'S ANNOTATED CALIFORNIA CODES
PENAL CODE
PART 1. OF CRIMES AND PUNISHMENTS
TITLE 9. OF CRIMES AGAINST THE PERSON INVOLVING SEXUAL ASSAULT, AND CRIMES AGAINST PUBLIC DECENCY AND GOOD MORALS

CHAPTER 10. GAMING

§ 330. Gaming defined; punishment

Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of those prohibited games, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding six month, or by both the fine and imprisonment.

§ 330.1 Slot machines or devices; manufacture, ownership, sale, possession, transportation, etc.; punishment; definition

Every person who manufactures, owns, stores, keeps, possesses, sells, rents, leases, lets on shares, lends or gives away, transports or exposes for sale or lease or offers to sell, rent, lease, let on shares, lend or give away or who permits the operation of or permits to be placed, maintained, used or kept in any room, space or building owned, leased or occupied by him or under his management or control, any slot machine or device as hereinafter defined, and every

person who makes or permits to be made with any person any agreement with reference to any slot machine or device as hereinafter defined, pursuant to which agreement the user thereof, as a result of any element of hazard or chance, may become entitled to received anything of value or additional chance or right to use such slot machine or device, or to receive any check, slug, token or memorandum, whether of value or otherwise, entitling the holder to receive anything of value, is guilty of a misdemeanor and shall be punishable by a fine of not more than one thousand dollars ($1,000) or by imprisonment in the county jail not exceeding six months or by both such fine and imprisonment. A slot machine or device within the meaning of Sections 330.1 to 330.5, inclusive, of this code is one that is, or may be, used or operated in such a way that, as a result of the insertion of any piece of money or coin or other object such machine or device is caused to operate or may be operated or played, mechanically, electrically, automatically, or manually, and by reason of any element of hazard or chance, the use may receive or become entitled to receive anything of value or any check, slug, token or memorandum, whether of value or otherwise, which may be given in trade, or the user may secure additional chances or rights to use such machine or device, irrespective of whether it may, apart from any element of hazard or chance also sell, deliver or present some merchandise, indication of weight, entertainment or other thing of value.